87-1911

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Date: May 23, 1988

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QUESTIONS PRESENTED *

1. Do the United States District Courts have jurisdiction under 28 U.S.C. § 1337(a) to enforce the commands of the Railway Labor Act, even though the rail carrier, which is claimed to have violated the Railway Labor Act, is participating in a transaction subject to regulation by the Interstate Commerce Commission under 49 U.S.C. § 11343(a)?

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* The parties to the proceeding below are:

Appellants below and petitioners here:

Railway Labor Executives' Association;
American Railway & Airway Supervisors Association (Division of TCU);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway Carmen (Division of TCU);
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermarkers and Blacksmiths;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
Railroad Yardmasters of America (Division of UTU);
Sheet Metal Workers' International Association;
Transportation • Communications Union (formerly BRAC);
United Transportation Union, and
International Federation of Professional and Technical Engineers.

Appellees below and respondents here:

Guilford Transportation Industries, Inc.;
Boston and Maine Corporation;
Delaware & Hudson Railway Company;
Maine Central Railroad Company;
Portland Terminal Company; and
Springfield Terminal Railway Company.

2. Does 49 U.S.C. § 11341(a) and its immunity from prohibitory or restraining federal laws apply to a rail carrier participating in a transaction within the scope of 49 U.S.C. § 11343(a) when that transaction has been exempted from regulation by an order of the Interstate Commerce Commission issued under 49 U.S.C. § 10505?

3. Does the ICC's jurisdiction over financial transactions concerning railroads relieve the rail carriers, participating in such transactions, of their obligations under the Railway Labor Act or under their collective bargaining agreements where compliance with those obligations would interfere with the carriers carrying out the transaction in the manner proposed in their pleadings filed with the Commission?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] [1] and fifteen (15) individual labor organizations [2] respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review the judgment of that court in *RLEA v. Guilford Transportation Industries, Inc.*, 1st Cir No. 87-1774, decided January 20, 1988.

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[1] RLEA is an unincorporated association of the chief executive officers of nineteen labor organizations which collectively represent virtually all organized rail employees in this country. A list of RLEA's member organizations is reproduced as Appendix F at page 53a. All of the individual petitioning labor organizations, except for the International Federation of Professional and Technical Engineers, are member organizations of RLEA.

[2] The individual petitioning labor organizations are listed at page i, note *.

OPINIONS BELOW

The *per curiam* decision of the First Circuit is not reported; it is reproduced as Appendix A to this Petition at pages 1a-2a. The judgment of the appellate court is reproduced herein as Appendix D at page 44a. The decision of the United States District Court for the District of Maine which was affirmed by the First Circuit is reported at 667 F. Supp. 29 and is reproduced herein as Appendix B at pages 3a-16a.

JURISDICTION

On January 20, 1988, the United States Court of Appeals for the First Circuit issued a *per curiam*, unpublished decision affirming the judgment of the United States District Court for the District of Maine dismissing petitioners' complaint to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review that judgment. This petition is timely since it is being filed within the time period provided by 28 U.S.C. § 2101(c); the initial 90 day period provided by Section 2101(c) ran to April 19, 1988, but on April 12, Justice Brennan granted petitioners a thirty-day extension to and including May 19, 1988 in which to file this petition, and on May 19, granted petitioners a further extension of seven (7) days. Sup. Ct. No. A-785, *RLEA v. Guilford Transportation Industries, Inc.*

STATUTES INVOLVED

This case involves the relationship between two Acts of Congress which regulate aspects of interstate commerce —*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* In particular, this case involves the impact of Sections 10505 and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 10505 and 11347, on the obligations imposed upon carriers by Sections 2 First, 2 Seventh, 5 First, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First,

152 Seventh, 155 First and 156, and on the federal courts' jurisdiction to enforce those duties. Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, Sections 11341(a) and 11343(a) of the Interstate Commerce Act, 49 U.S.C. §§ 11341(a) and 11343(a), and Section 405(b), of the Rail Passenger Service Act, 45 U.S.C. § 565(b), along with 28 U.S.C. § 1337(a), are also relevant to this case. The relevant statutes are reproduced as Appendix E at pages 45a-52a.

STATEMENT OF THE CASE

Respondents are a holding company, Guilford Transportation Industries, Inc. [hereinafter, "GTI" or "Guilford"], four of its rail subsidiaries which are leasing their rail lines,[3] and the GTI subsidiary which is leasing those lines, the Springfield Terminal Railway Company [hereinafter, "ST"]. Formed in the early 1980's to operate a rail system in the Northeast region of this country, primarily in the New England area, the Guilford rail system included almost 4,000 miles of rail lines in early 1986, employing approximately 4,000 employees. *See, GTI—Control—D&H*, 366 I.C.C. 396, 397 (1982). In 1986, one of the petitioners, the Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"], conducted a work stoppage against respondents MEC and PT, and within a few weeks, that strike resulted in approximately 98% of the Guilford rail system's employees withholding their labor from Guilford. *See, RLEA v. B&M*, 808 F.2d 150, 153 (1st Cir. 1986), *cert. denied*, 98 L. Ed.2d 62 (1987). Several issues arising from that strike eventually wound up being resolved by this Court (*Burlington Northern R.R. v. BMWE*, 481 U.S. ——, 95 L. Ed.2d 381 (1987)) and by Congress. *E.g.*, Pub. L. No. 99-431, 100 Stat. 987 (1987).

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[3] The leasing railroads are Boston and Maine Corporation, Delaware & Hudson Railway, Maine Central Railroad, and Portland Terminal Company [hereinafter, "B&M," "D&H," "MEC," and "PT," respectively].

That strike and Guilford's efforts to continue its operations despite the withdrawal from service by most of its contract employees, led Guilford to take steps beginning in May 1986 to eliminate both the collective bargaining agreements between its main subsidiaries (*i.e.*, the B&M, D&H, MEC and PT) and rail labor, and the craft line restrictions on the utilization of employees. *RLEA v. B&M*, 664 F.Supp. 605 (D. Me. 1987). Guilford first tried to use the collective bargaining process and the ten (10) day "loop-hole" in Section 6 of the Railway Labor Act, 45 U.S.C. § 156,[4] to promulgate its craftless employment terms, but those efforts were stopped when the unions invoked the mediatory jurisdiction of the National Mediation Board [hereinafter, "NMB"] under Section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First. *RLEA v. B&M*, *supra*, 664 F.Supp. at 609-11.

A. Guilford's Leases

Once its efforts to eliminate its existing collective bargaining agreements in a short time frame were stymied, Guilford began to lease various portions of its subsidiaries' rail operations to another one of its subsidiaries, respondent ST. Under those leases, the lessors leased specific portions of their lines and facilities to the ST for the ST to provide the lessors' rail services. However, those agreements provided that:

> All traffic which originates or terminates on the Leased Lines shall remain [the lessor's] . . . traffic, whether such traffic involves customers presently located on or served by the Leased Lines or customers which become located on or served by the Leased Lines at any time during the term of this Lease

[4] Section 6 of the Railway Labor Act requires the parties to a major dispute to preserve the status quo "unless a period of ten days has elapsed after termination of conferences, without request for or proffer of the services of the Mediation Board." 45 U.S.C. § 156; *see, Iberia Air Lines v. NMB*, 472 F.Supp. 104 (S.D.N.Y. 1979), *aff'd* 636 F.2d 1201 (2d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

> Agreement. ST shall handle cars on the Leased Lines for the account of [the lessor] . . . , and [the lessor] . . . shall be responsible for car hire and mileage payments in respect of such cars. [Lessor] . . . shall have and retain the exclusive right to deal directly with customers regarding traffic moving to or from the Leased Lines and to solicit such traffic in its best interest.

Lease Agreement at § 2.03, Joint Appendix in 1st Cir. No. 87-1774 [hereinafter, "J.A."] at 47. Respondent ST was also made responsible for maintaining the tracks. *Id.* at § 3.01; J.A. at 48. In exchange for performing those services, respondent ST is to be paid a set fee, generally $150.00, for each loaded car it moves for the lessor; ST, however, does not pay any rent to the lessor. *Id.* at § 2.06; J.A. at 48. In short, the lease agreements gave the ST the right to perform the labor for the lessors which the lessors had previously agreed their contract employees should perform.

Guilford began to enter into the ST lease arrangements in October 1986, and by the end of 1987 had entered into seventeen (17) different leases and one operating agreement, which collectively will transfer all of the B&M, D&H, and MEC operations and most of the PT's operations to the ST. ICC Finance Docket No. 30965, *et al.*, *D&H—Lease and Trackage Rights Exemption—ST*, served February 19, 1988 (a copy of the corrected decision is attached as Appendix C at pages 17a-43a). As Guilford informed the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"], its subsidiaries entered into those leases for the following reason:

> The purpose of the transaction is to enable ST to carry on the operations presently performed by [the lessor] . . . on these lines. ST is a short line carrier which has a lower cost structure than [the lessor] . . . and other Class I carriers. It is anticipated that the service which ST will provide to rail customers will be more responsive and efficient than [the lessor] . . . is providing at the present time. As a re-

> sult of the lease, [the lessor] . . . will improve its financial viability by eliminating operations which are costly to perform in relation to the revenues which are realized. With its lower cost structure, ST should be able to perform such operations on a profitable basis.

Verified Notice of Exemption in Finance Docket No. 30966 at 6; J.A. at 33. Respondent ST has a lower cost structure simply because prior to the GTI leases, it was a small carrier that employed few employees (around fifty (50) employees prior to January 1, 1987) and was a party to a collective bargaining agreement with one member of RLEA which provided for lower rates of pay and, according to GTI, did not contain craft line distinctions. Appendix C at 27a-28a.

Petitioners alleged in their Complaint in this case that the leases were "a systematic and deliberate plan [by respondents] to effect without bargaining the changes in rules and working conditions which they had proposed in May 1986" and which were pending before the NMB for mediation under Section 5 First of the Railway Labor Act. *E.g.*, Complaint at ¶ 13. Petitioners also alleged in their Complaint that the leases and respondents' use of the ICC processes were being utilized "for the purpose of eliminating various work rules and eliminating all craft line distinctions without first exhausting the major dispute resolution procedures of the Railway Labor Act." Complaint at ¶ 13. Petitioners further alleged that respondents hoped to achieve their purposes by relying upon the ICC's belief that its orders, including rail exemptions under 49 U.S.C. § 10505, relieved carriers of their obligations under the Railway Labor Act and under their collective bargaining agreements and, thus, enabled Guilford to transfer to the ST the right to perform the lessor carrier's labor under the ST's rates of pay, rules and working conditions without first bargaining with rail labor over those proposed changes to the lessor's existing employment terms. Complaint at ¶ 15-16.

To effectuate its lease arrangements, GTI exercised a class exemption which the ICC had granted under 49 U.S.C. § 10505 to all affiliated rail carriers from the prior approval requirements of 49 U.S.C. § 11343(a) for intracorporate family financial transactions "that do not result in adverse changes in service levels, signficant operational changes, or a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.2(d)(3), promulgated by *Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980). In order to exercise that blanket exemption, a rail carrier planning to participate in such an exempt transaction need only file with the Commission "a verified notice of the transaction . . . at least one week before the transaction is consummated . . . ." 49 C.F.R. 1180.4(g)(1). Within thirty (30) days of the filing of the verified notice, the Commission will publish a description of the exempt transaction in the Federal Register, but in the interim, the exemption is effective and the carriers may implement their transaction at any time more than seven (7) days after the notice is filed with the ICC. 49 C.F.R. § 1180.4(g)(1)(ii).[5]

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, requires the ICC to condition all approvals of Section 11343 rail transactions by imposing a fair arrangement to protect the interests of rail employees who may be affected by the implementation of the approved transaction. In this case, however, the leases were not "approved" by the ICC, for the class exemption which Guilford exercised exempted the lease transactions from the prior approval requirements of Section 11343.[6]

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[5] This seven day time frame is modified by the advance notice required by the employee protective conditions which Sections 10505(g)(2) and 11347 require be imposed.

[6] Respondents assert that an exemption is an "approval;" this dispute is relevant here because Section 11341(a)'s immunity applies to "approvals" under Section 11344, but, petitioners submit, not to rail exemptions. *See* pages 21-23, *infra*.

Nevertheless, Section 10505(g)(2) of the Interstate Commerce Act prohibits the ICC from exempting a rail carrier from "its obligation to protect the interests of employees as required by" the Interstate Commerce Act. 49 U.S.C. § 10505(g)(2).

In this case, however, a question arose when Guilford began to lease MEC and D&H operations to the ST as to the appropriate level of employee protections to be imposed as required by Section 11347. Guilford asserted that the appropriate levels of protection were those known as the *Mendocino Coast* conditions which were normally imposed in lease cases.[7] Rail labor, however, asserted that because of the relationship of the leases to the earlier control cases and because of the circumstances of this case, the appropriate levels of protection were those provided by what are known as the *New York Dock* conditions.[8] As relevant here, the primary difference between the two sets of conditions lies in the "implementing agreement" requirements. According to the Commission, implementing agreements under the *Mendocino Coast* conditions do not involve both carriers, whereas *New York Dock* implementing agreements do. Appendix C at 21a-22a n.4. And second, under the *New York Dock* conditions, the carriers may not implement the transaction until after an implementing agreement or arbitrated arrangement is reached which provides the basis on which the forces to perform the affected work will be selected; the *Mendocino Coast* conditions allow the implementing arrangement to be devised *after* the transaction is effectuated. *Id.*

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[7] The *Mendocino Coast* conditions are those employee protections first promulgated in *Mendocino Coast Ry.—Lease and Operate*, 354 I.C.C. 732 (1978), *as modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

[8] The *New York Dock* conditions are those employee protections first promulgated in *New York Dock Ry.—Control*, 360 I.C.C. 60, *aff'd New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

Because of this dispute as to the appropriate levels of protection if the leases went forward, petitioner RLEA asked the ICC to stay the effectiveness of the exemptions until it decided what were the appropriate levels of protection required by Section 11347 in these lease proceedings. Initially, however, the ICC denied rail labor's requests, stating that it was taking RLEA's request for the *New York Dock* conditions under advisement and that in the interim, if the carriers consummated any lease, they did so at their "own risk," for "[s]hould the Commission subsequently determine that a higher level of protection is required, [the parties] . . . will be required to provide . . . employees with that greater protection." ICC Finance Docket No. 31015, served June 5, 1987 at 6; J.A. at 117.[9] In late October 1987, the ICC stayed implementation of the unconsummated leases until it resolved the employee protection issue. *See*, Appendix C at 23a-24a.

While the ICC was considering the appropriate level of protection for employees affected by the leases, Guilford consummated eleven (11) leases, transferring the entire MEC operations, and most of the B&M and PT operations to the ST. More than 2,000 employees were affected by those leases, and while most obtained jobs with the ST, employment with the ST was governed by

[9] On May 18, 1987, the ICC issued an order setting the question of the appropriate level of employee protection for a hearing on its modified procedure basis—*i.e.*, written submissions—and on February 19, 1988 it issued a decision concluding that modifications to the *Mendocino Coast* conditions implementing agreement requirements were needed, but that the *New York Dock* conditions were not needed. Appendix C. Rail labor, on December 8, 1987, had asked the ICC to revoke the exemptions because, rail labor asserted, there was no independent transportation purpose for the leases which would justify their impact on the employees' Railway Labor Act and contractual rights. Although the ICC denied rail labor's petitions to revoke, it did not address that argument, and on March 10, 1988, petitioners asked the ICC to reopen that decision; that petition is still pending.

entirely new rates of pay, rules and working conditions. Appendix C at 26a-28a.[10] However, hundreds of the lessors' employees did not take a job with the ST, and on November 12, 1987, the ST employees struck that carrier over what the employees claimed were unsafe working conditions. That strike is still in progress, although the parties are currently arbitrating whether Guilford improperly refused the employees' offer to return to service.

B. Petitioners' Efforts To Enforce The Railway Labor Act

On January 28, 1987, petitioners filed a two count complaint with the United States District Court for the District of Maine, the first count to enforce the *New York Dock* conditions which were imposed as a condition of the 1982 control authorizations (*see, GTI—Control—D&H, supra*), and the second count to enforce the Railway Labor Act. On January 30, the district court tentatively dismissed the first count of the complaint[11] and respondents subsequently moved to dismiss the remaining count for lack of subject matter jurisdiction. After that issue was fully briefed, rail labor asked the district court to issue a preliminary injunction to enforce the Railway

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[10] The issue of what employment terms will govern ST operations is still not settled, for on February 19, 1988, when the ICC concluded that the *Mendocino Coast*'s implementing agreement provisions were not adequate in this case, it required all of the Guilford carriers to negotiate or arbitrate an implementing arrangement with rail labor which will provide a basis on which employees of the lessors will be able to follow their work to the ST. Appendix C. The parties are presently arbitrating that arrangement and one of the issues raised by GTI is whether the ST agreement should govern its operations.

[11] That tentative ruling was finalized on July 27, 1987, for the court concluded that petitioners' attempt to enforce the *New York Dock* conditions was within the primary jurisdiction of the ICC and that no justification existed to retain jurisdiction over the claim pending the ICC's determination of the claim. Appendix B at 11a-13a. Petitioners did not challenge that ruling on appeal and are not asking this Court to review that ruling.

Labor Act by enjoining any further implementation of the leases and by requiring respondents to rescind the leases which they had previously implemented. On July 27, 1987, the district court issued its decision dismissing the complaint for lack of jurisdiction.

Relying upon *BLE v. B&M*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986), in which the First Circuit had reached a similar result, the district court concluded that Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), relieved respondents from all legal obstacles that would impede the transaction, such as respondents' obligations under the Railway Labor Act. According to the district court, "Congress has expressly provided, through its enactment of section 11341, that transactions deemed to be in the public interest by the ICC override the rights and duties created by Congress in the RLA." Appendix B at 15a. As the lower court explained (*Id.*):

> Although [petitioners] . . . lose whatever their rights would be under the RLA, [petitioners] . . . have not lost all for they have a remedy—and are in fact concurrently pursuing it—compensation for the loss of their RLA rights. This remedy is provided by the ICC. Therefore, the forum for raising these arguments is the forum provided by that agency.

After concluding that the complaint had to be dismissed, the district court indicated that it was not oblivious to what was happening, for the court stated (Appendix B at 16a):

> Over the course of this labor dispute, the parties have been repeatedly successful in invoking the jurisdiction of this Court to enforce the mandates of the RLA. [Respondents'] . . . goal in these proceedings has not been hidden; they have sought and continue to seek a streamlined work force and the implementation of their conception of a cost-efficient labor agreement. [Respondents'] . . . efforts, however, have been remarkably unsuccessful, due in part to their failure to reach a meaningful agreement with

> the unions involved and in part to the almost interminable procedures of the RLA, procedures which have been upheld by various decisions of this Court and which have been supplemented by various actions of both Congress and the President. Nevertheless, [respondents] . . . have now apparently discovered an alternate method to achieve a similar goal. Although the Court has examined the record presented in this case and has considered with care the arguments raised by [petitioners] . . . , the Court finds that [petitioners] . . . have presented their request for relief to the wrong forum. The relief they request is available only from the ICC and not from this Court. . . .

On August 3, 1987, petitioners noted an appeal from the district court's judgment dismissing their complaint, and subsequently suggested that the United States Court of Appeals for the First Circuit hear their appeal *en banc* because that appeal was controlled by *BLE v. B&M*, *supra*, which petitioners asserted was incorrectly decided. That suggestion was denied and on January 20, 1988, the appellate court entered its ruling affirming the judgment of the district court. Appendix A at 1a. According to the appellate panel, "[c]ontrary to [petitioner's] . . . argument, Justice Stevens' opinion in *ICC v. Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360, 2370 (1987) (Stevens, J., concurring), casts no large shadow of doubt over our earlier decision in" *BLE v. B&M*, *supra*. Appendix A at 2a. Moreover, the panel concluded that: "Nor have any compelling reasons been advanced which make us believe that reconsideration of our recent precedent should be undertaken or recommended by this panel." *Id.*

REASONS FOR GRANTING THE WRIT

This Case Presents Important Issues Of Federal Law That Have Been Decided In A Manner Which Conflicts With Applicable Decisions Of This Court And Other Courts Of Appeals, And With The Intent Of Congress. Moreover, Those Issues Have Been Decided In A Manner That Needlessly Creates A Conflict Between Two Acts Of Congress Which Regulate The Rail Industry

I. This Case Presents Issues That Are Important To The Rail Industry And Need To Be Resolved Expeditiously By This Court

Under the statutory scheme that Congress has adopted to regulate labor relations in the rail industry, a railroad may not "change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6" of the Railway Labor Act. 45 U.S.C. § 152 Seventh. Section 6 of the Act, 45 U.S.C. § 156, in turn requires thirty (30) days advance written notice of the proposed change, and together with Sections 2 First and 5 First of the Act, 45 U.S.C. §§ 152 First, 155 First, requires the carrier both to exert every reasonable effort to reach an agreement on its proposed change and to preserve the status quo pending full compliance with its bargaining obligations under the labor statute. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969).

Applied to this case, the Railway Labor Act required the Guilford carriers to give the notice mandated by Section 6 of their intent to lease their operations to the ST and to make every reasonable effort to negotiate an agreement with rail labor about that plan and its impact on employees. Moreover, the labor statute prohibited respondents from changing the status quo by transferring their operations to the ST until they had complied fully with the Act's bargaining obligations. *E.g.*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971); *ALPA*

v. Transamerica Airlines, Inc., 817 F.2d 510 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 451 (1988); *St. Louis Southwestern Ry. v. BRS*, 665 F.2d 987 (10th Cir. 1981); *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965). Guilford did not comply with that statute because it asserted that its obligations under the labor statute were "preempted" by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

Railroads are subject to regulation under the Interstate Commerce Act which, as relevant to this case, prohibits a rail carrier from leasing its operations to another railroad without first obtaining the approval of the ICC. 49 U.S.C. § 11343(a)(2). Moreover, the ICC may not approve such a lease transaction unless the carriers agree to provide a fair arrangement to protect the interests of all rail employees who may be affected by the lease. 49 U.S.C. § 11347. Also, as relevant here, for the past twelve (12) years the ICC has been given the power to exempt a rail carrier from the prior approval requirements of the Interstate Commerce Act if the Commission concludes that regulation under that Act "is not necessary to carry out the transportation policy" of 49 U.S.C. § 10101a and that the transaction at issue is of limited scope. 49 U.S.C. § 10505(a). That power, however, may not be used "to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle" including by 49 U.S.C. § 11347. 49 U.S.C. § 10505(g)(2).

For more than sixty (60) years, the Railway Labor Act and the Interstate Commerce Act have existed side-by-side, and not once during the first fifty-six (56) years of that co-existence did the courts or the ICC conclude that there was in fact an irreconcilable conflict between those two Acts of Congress. *Compare, Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696, 701-02 (1958), *with, Southern Ry.—Control*, 331 I.C.C. 151, 169-

71 (1967).[12] However, in 1983 the ICC, relying upon the immunity from conflicting laws conferred by 49 U.S.C. § 11341(a),[13] stated that its order in a merger case had the effect of relieving the railroads participating in that approved transaction from obligations imposed by the Railway Labor Act (*see*, ICC orders at issue in *ICC v. BLE*, 482 U.S. ——, 96 L. Ed.2d 222 (1987)), and since that time the railroads have been using ICC approval orders and exemption orders to rid themselves of collective bargaining obligations without first bargaining under the Railway Labor Act. *See, Arbitration Between BLE and Union Pacific R.R. and Missouri Pacific R.R.*, re ICC Finance Docket No. 30,000, decided January 17, 1985 (Seidenberg, Neutral) (a copy of that decision is reproduced herein as Appendix G at pages 54a-63a). Moreover, relying upon the collateral attack rule expressed in *Venner v. Michigan Central R.R.*, 271 U.S. 127, 130 (1926), and their belief that the ICC has been given exclusive jurisdiction over labor disputes arising

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[12] In several cases, the lower courts have stated that if there were such a conflict between the two statutes, the Interstate Commerce Act would prevail over the commands of the Railway Labor Act because of the express immunity granted by what is now Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), *e.g., Burlington Northern, Inc. v. ARSA*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); in one case, *BLE v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), the appellate court held that Section 11341(a)'s predecessor superseded the Railway Labor Act, but noted that there was no conflict between the two Acts in that case. 314 F.2d at 433.

[13] 49 U.S.C. § 11341(a) provides in pertinent part, that:

> A carrier . . . participating in that approved or exempted transaction [*i.e.*, a "transaction approved by or exempted by the Commission under this subchapter"—Sections 11341 to 11351] is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

from ICC regulated transactions, the railroads and the ICC have argued, often successfully, that rail labor may not ask the federal courts to enforce the Railway Labor Act.

Even though the impact of ICC orders on rail employees' substantive and enforcement rights under both the Railway Labor Act and their collective bargaining agreements has been a frequent subject of litigation between rail labor and management during the past five years, that question is still in dispute. *Compare, BLE v. B&M*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986), *with, RLEA v. Pittsburgh & Lake Erie R.R.*, 3rd Cir. No. 87-3797, decided April 8, 1988, *pet. for cert. pending*. Sup. Ct. No. 87-1888. Indeed, it is not even settled today whether rail labor can invoke the aid of the federal courts to determine whether the Railway Labor Act is, or is not, superseded, for the lower courts are divided on whether such a suit is a collateral attack on the ICC's order authorizing or exempting the financial transactions. *Compare, BLE v. B&M, supra*, 788 F.2d at 801, *and UTU v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987), *appeal pending*, 9th Cir. No. 87-4386, *with, RLEA v. Pittsburgh & Lake Erie R.R., supra.*

Petitioners respectfully submit that it is crucial to the stability of the rail industry today that this Court settle the current dispute over the relationship between the transportation and labor statutes. As may be expected, the abrogation of contractual and statutory rights has severely strained labor relations in the rail industry, and, when coupled with the lack of any meaningful forum to enforce existing rights, has forced rail labor to exercise its economic powers to enforce those rights. To date, there have been two strikes and the threat of five other strikes because of the carriers' belief that the Interstate Commerce Act relieves them of their Railway Labor Act and contractual obligations, and there is the possibility of yet another strike if the Burlington Northern Railroad

consummates an ICC exempted transfer of operations to a wholly-owned subsidiary. *See, Burlington Northern R.R. v. UTU*, N.D. ILL. Civil Action No. 88 C 2687. Because the underlying dispute between the parties is essentially a legal one, a negotiated resolution is difficult and, thus, any one of those strikes may lead to a nation-wide curtailment of rail service. *See, Burlington Northern R.R. v. BMWE*, 481 U.S. ——, 95 L. Ed.2d 381 (1987).

At present, there are cases pending before five circuit courts of appeals [14], at least four district courts,[15] and this Court [16] that raise some of the issues. However, none of those cases, except for this case, presents all three of the relevant issues which need to be resolved. Since the frequency of the carriers' use of the ICC's putative powers has increased in the past year, the rail industry does not have the time to see if the lower appellate courts can reconcile the widely divergent views on this issue. More important, however, such a reconciliation is unlikely because, when examined closely, the First Circuit's approach is contrary to the Interstate Commerce Act and to prior decisions by this Court.

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[14] *RLEA v. City of Galveston*, 5th Cir. No. 87-6169; *Chicago & North Western Transportation Co. v. RLEA*, 7th Cir. No. 88-1504; *Burlington Northern R.R. v. UTU*, 8th Cir. No. 87-2600WM; *RLEA v. Chicago & North Western Transportation Co.*, 8th Cir. No. 87-5071 MN; *UTU v. Burlington Northern R.R.*, 9th Cir. No. 87-4386; *Brotherhood of Railway Carmen v. CSX Transportation, Inc.*, 11th Cir. No. 87-8466.

[15] *CSX Transportation, Inc. v. UTU*, W.D.N.Y. Civil Action No. 87-1391C; *RLEA v. Soo Line R.R.*, N.D.Ill. Civil Action No. 87 C 5293; *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D.Ill. Civil Action No. 87 C 9847; *Burlington Northern R.R. v. UTU*, N.D.Ill. Civil Action No. 88 C 2687; *Burlington Northern R.R. v. UTU*, W.D.Mo. Civil Action No. 86-5013-CV-SW-8; *BLE v. Burlington Northern R.R.*, E.D.Wa. Civil Action No. C-88-233-RJM.

[16] *Pittsburgh & Lake Erie R.R. v. RLEA*, Sup. Ct. No. 87-1888 (filed May 17, 1988); *Pittsburgh & Lake Erie R.R. v. RLEA*, Sup. Ct. No. 87-1589 (filed March 24, 1988).

In view of the extreme importance of these issues to the orderly administration of the Railway Labor Act and the Interstate Commerce Act, petitioners respectfully submit that this Court should conclude what it attempted to do two years ago when it granted certiorari in *ICC v. BLE* and determine whether there is in fact a conflict between the two Acts of Congress, and if so, which statute prevails.

II. The Decision Below Was Decided In A Way That Conflicts With Applicable Decisions Of This Court

In concluding that it lacks jurisdiction to consider petitioners' complaint to enforce the Railway Labor Act, the district court noted that the ICC was, pursuant to rail labor's request, considering the impact of the leases on the employees' collective bargaining rights. Appendix B at 15a. Since that inquiry was relevant to the levels of employee protection which the Commission would eventually impose, the lower courts reasoned, the ICC, and not the federal courts, had the exclusive jurisdiction to determine exactly how rail labor's rights will be protected in this case. *See, BLE v. B&M, supra*, 788 F.2d at 801. That approach to the relationship between the Interstate Commerce Act and the Railway Labor Act, petitioners submit, is contrary to prior decisions of this Court which have emphasized that the Commission does not have jurisdiction to enforce other laws and that the tribunal called upon to enforce that "other law" is to determine the impact of the ICC's order on the rights protected by the "other law". *E.g., Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-88 (1944); *see also, ICC v. BLE, supra*, 96 L. Ed.2d at 247 n.13 (Stevens J. concurring).

In *McLean Trucking*, this Court addressed the relationship between the Commission's obligation to consider the policies of overlapping, non-transportation laws and the enforcement of those laws. In that case, which in-

volved the antitrust laws, this Court stated (321 U.S. at 79-80):

> . . . Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. . . .
>
> But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. . . .

McLean Trucking's teachings were amplified in *Seaboard* when this Court raised *sua sponte* the question of whether a State court called upon to decide the impact of an ICC order on a State law had jurisdiction to entertain that suit, or did the federal courts which had jurisdiction to review the ICC order have exclusive jurisdiction over that question. 333 U.S. at 122. This Court concluded that the State court had jurisdiction. In reaching that conclusion, this Court stated (333 U.S. at 123):

> [T]he state court . . . had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the order, properly interpreted, did exempt [the railroad] . . . from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order.

When these principle are applied to this case, it becomes clear that the ICC, in discharging its duties under

the Interstate Commerce Act, has to consider the impact of its orders on rail labor's rights under other laws, such as the Railway Labor Act.[17] Petitioners fully recognize that the question of whether the ICC has discharged that responsibility is reviewable solely in the courts of appeals under 28 U.S.C. §§ 2321(a) and 2341, *et seq.* However, that question is separate and distinct from the issues of whether the ICC's orders supersede the Railway Labor Act and existing collective bargaining agreements, and whether those non-ICC related rights are enforceable. Those questions, according to *Seaboard* and to four Justices of this Court, are to be decided by the "tribunal that is faced with a claim that a party is violating" the non-transportation statute. *ICC v. BLE*, *supra*, 96 L. Ed.2d at 247 n.13; *see also*, *BLE v. Chicago & North Western Ry.*, *supra*, 314 F.2d at 428.

In this case, the lower courts refused to accept jurisdiction over rail labor's complaint because they assumed the ICC had the responsibility to enforce the public policies behind the Railway Labor Act. Appendix B at 15a. But that assumption is contrary to this Court's holding in *McLean Trucking* and, in light of the ICC's limited role over labor issues, effectively means that those labor policies are being ignored.

III. The Decision Below Ignores The Clear Language Of The Interstate Commerce Act That Rail Exemptions Under 49 U.S.C. § 10505 Do Not Confer An Immunity On The Carriers Participating In That Exempt Transaction

At the heart of the district court's decision in this case (*i.e.*, a case involving a rail exemption) was the conclusion that "Congress has expressly provided, through its enactment of section 11341, that transactions deemed to be in the public interest by the ICC override the rights and duties created by Congress in the RLA." Appendix

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[17] Rail labor has asked the ICC to consider the impact of its rulings on other laws. *See*, note 9, *supra*.

B at 15a. That conclusion, which is the same one reached by the First Circuit in *BLE v. B&M*, *supra*, 788 F.2d at 800, is contrary to the language of the statute, to its legislative history and to the interpretation of that statute by the ICC in rail exemption, non-labor situations. Since the First Circuit has refused to reconsider its holding in *BLE v. B&M* even though rail labor pointed out the inapplicability of Section 11341(a) to rail exemptions, and since this issue is so important to the orderly administration of the two Act of Congress which are at issue here, petitioners ask that this Court exercise its supervisory powers and correct this clear misapplication of an important Act of Congress.

Between 1920 when it was first added to the Interstate Commerce Act as Section 5(8), 41 Stat. 456, 482, until 1982 when it was amended by the Bus Regulatory Reform Act, Pub. L. No. 97-261, 96 Stat. 1102 (1982), Section 11341(a) and its predecessors provided in substance that its immunity extended to "a transaction approved by the Commission under this subchapter . . . ." 92 Stat. 1434 (1978). The subchapter to which Section 11341(a) refers is Subchapter III of Chapter 113, or Sections 11341 to 11351. Rail exemptions, on the other hand, are granted under Section 10505 and the Commission has acknowledged in non-labor cases that the immunity provided by Section 11341(a) does not apply to transactions exempted from regulation by Section 10505.[18] ICC Finance Docket No. MC-F-16248, *Burlington Northern, Inc.—Control Exemption*, served February 13, 1986, op. at 6 (unpub-

[18] The ICC, however, maintains that its orders operate to relieve a rail carrier of its Railway Labor Act and contractual obligations, but that position appears to be premised upon its view that it has exclusive jurisdiction over labor issues arising from a financial transaction subject to its regulation, and not upon an application of Section 11341(a). *See*, ICC Finance Docket No. 31205, *FRVR Corporation—Exemption Acquisition And Operation*, served January 29, 1988, *pet for review pending, RLEA v. ICC*, 8th Cir. No. 88-1280 (that decision is reproduced as Appendix B to the Brief for the NLRC in Sup. Ct. No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, filed April 19, 1988).

lished) ("transactions exempted under section 10505, although exempted *from* the regulatory approval requirements of sections 11343 *et seq.*, would appear not to be eligible for that antitrust immunity" conferred by § 11341(a) [emphasis in original]).

In 1982, Congress enacted the Bus Regulatory Reform Act and added to Section 11343 an exemption provision. 96 Stat. at 1122, adding 49 U.S.C. § 11343(e). That provision gave the ICC the power to exempt motor carriers from the prior approval requirements of Section 11343, but it does not apply to pure rail transactions. *Burlington Northern, Inc.—Control, supra.* That Act also amended Section 11341(a) to provide that its immunity provisions would apply to any "carrier . . . participating in . . . a transaction approved by *or exempted by* the Commission under this subchapter . . . ." 49 U.S.C. § 11341(a) (words emphasized added by 96 Stat. at 1122). But again, that immunity does not extend to rail exemptions because those exemptions are not granted under Subchapter III of Chapter 113. *Ex Parte No. 282 (Sub-No. 9), Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985). In its recent decision in *Ex Parte No. 282*, the ICC stated as follows (1 I.C.C.2d at 279):

> The addition of "or exempted by" to section 11341(a) does not broaden the scope of section 11341 to reach transactions exempted under section 10505. Section 11341(a) reaches only transactions exempted "under this subchapter", that is, subchapter III of Chapter 113 of the Act. The exemption in this proceeding is under subchapter I of Chapter 105 of the Act. Accordingly, section 11341(a) does not apply to the transactions exempted in this proceeding.

Congress clearly intended to exclude rail exemptions from the immunity granted by Section 11341(a), for it stated in the reports accompanying the Bus Regulatory Reform Act that the amendments to Chapter 113 were not intended "in any way [to] affect the ICC's jurisdiction

with regard to rail transactions under" Section 11343. H. Rpt. No. 97-780, 97th Cong., 2d Sess. at 56 (1982). Construing the amended Section 11341(a) as extending that section's antitrust and "other laws" immunity to rail exemptions would clearly expand the ICC's jurisdiction over rail transactions and would be contrary to this Court's admonition that "exemptions from the antitrust laws are strictly construed and strongly disfavored." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986). On the other hand, excluding rail exemptions from the immunity granted by Section 11341(a) is not unique, for Congress has similarly limited the grant of immunity in airline cases. *Compare*, 49 U.S.C. § 1384 (1976), *with*, § 1384 as amended by Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; Conference Report, H. Rpt. No. 95-1779, 95th Cong., 2d Sess. at 78 (1978).

Another problem with the lower courts' conclusion that Section 11341(a) evinces Congress' intention "that transactions deemed to be in the public interest . . . override the rights and duties created by Congress in the RLA" (Appendix B at 15a), is that, even if Section 11341(a) were applicable to this case, it would not override the Railway Labor Act rights of the affected employees.[19] All ICC approvals of rail transactions to which Section 11341(a) applies must be conditioned by an arrangement that protects the interests of employees (49 U.S.C. § 11347), and that arrangement must contain provisions "preserv[ing] . . . rights, privileges, and benefits . . . to [the affected] . . . employees under existing collective-bargaining agreements or otherwise; [and] . . . continu[ing] . . . collective bargaining rights." 45 U.S.C.

[19] Recently, the ICC has stated that: "Immunity under section 11341(a) . . . may not be a panacea. Immunity is limited 'to the scope of the issues we are charged to consider in providing our approval' to a transaction." *Ex Parte No. 282, supra*, 1 I.C.C.2d at 279, *quoting Norfolk & Western Ry.—Purchase*, 363 I.C.C. 882, 892 (1981).

§ 565(b)(1) and (2), incorporated into 49 U.S.C. § 11347. Since Section 11341(a) relieves a carrier participating in a lease transaction from the requirements of other laws only in so far "as necessary to let" that carrier carry out the transaction as approved and conditioned by the Commission, no rail carrier can be relieved of its obligations under either the Railway Labor Act or its collective bargaining agreements because Section 11347 requires that those obligations be preserved and continued. Consequently, Section 11347 eliminates the potential for a conflict between the Interstate Commerce Act and the Railway Labor Act to which Section 11341(a) could even arguably apply.

Petitioners respectfully submit that the correct relationships between the transportation and labor statutes is extremely important to the orderly administration of both laws, especially since rail carriers are now using the transportation statute to achieve labor costs reductions which they did not obtain through collective bargaining. Moreover, a final resolution of this issue deserves a full consideration of all of the arguments and not just a blind acceptance of the concept that surely the Interstate Commerce Act is supreme and prevails; that blind assumption, petitioners submit, ignores the fact that the Railway Labor Act, like the transportation statute, is an exercise of Congress' exclusive jurisdiction over interstate commerce. *E.g., UTU v. Long Island R.R.*, 455 U.S. 678, 688-89 (1982).

IV. This Case Presents The Best Vehicle Of The Pending Cases To Decide The Jurisdictional And Substantive Issues Presented By The Railroads' Use Of The Interstate Commerce Act To Obtain Labor Relations Advantages

This case, petitioners submit, presents in a very clear-cut factual situation the major issues raised by the use of the Interstate Commerce Act to override both the Railway Labor Act and existing collective bargaining agreements, for this case was decided on a motion to dismiss

with the factual allegations of the complaint having been supplemented by extensive factual declarations. Indeed, the relevant facts are essentially undisputed, but even if disputed, must be viewed in the light most favorable to petitioners. Moreover, this case, unlike the *RLEA v. Pittsburgh & Lake Erie R.R.* case (*i.e.*, Sup. Ct. No. 87-1888), which is currently before this Court on the railroad's request for a writ of certiorari, involves a factual setting in which the ICC imposed a form of employee protective conditions. Thus, this case has the potential to resolve the question of whether the presence of such conditions, as the district court believed, represents "compensation for the loss of . . . RLA rights" (Appendix B at 15a) and justifies the ICC's belief that such protections are the sole source of employees' rights in dispute arising from ICC exempted or regulated transactions. No employee protections were imposed by the ICC in the *Pittsburgh & Lake Erie* case.

In short, this case presents the best vehicle available today to resolve the crucial issues which are placing an intolerable strain on labor relations in the rail industry.

CONCLUSION

For the reasons set forth herein, petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review its judgment in *RLEA v. GTI, supra.*

Respectfully submitted,

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Date: May 23, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1774

RAILWAY LABOR EXECUTIVES 'ASSOCIATION, *et al.*,
Plaintiffs, Appellants,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Torruella and Selya, *Circuit Judges.*

John O'B. Clarke, Jr., with whom *Highsaw & Mahoney, P.C.*, *Craig J. Rancourt* and *Law Office of Craig J. Rancourt* were on brief for appellants.

Ralph J. Moore, Jr., with whom *D. Eugenia Langan, Jonathan T. Weinberg, Shea & Gardner, Charles S. Einsiedler, Jr.*, and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief for appellees.

January 20, 1988

Per Curiam. Counsel for appellants has conceded that the decision of this court in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986), controls this appeal. We have consistently held in such circumstances that the error-correcting function (if any error there be) should ordinarily be reserved to court en banc, not seized by a successor panel. *See Lacy* v. *Gardino*, 791 F.2d 980, 985 (1st Cir.), *cert. denied*, 107 S. Ct. 284 (1986). We see no reason to depart from that prudential rule in this instance. Simply put such departure "demands special justification", *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984), and there has been no such showing here. Contrary to appellant's argument, Justice Stevens' opinion in *ICC* v. *Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360, 2370 (1987) (Stevens, J., concurring), casts no large shadow of doubt over our earlier decision in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, *supra*. Nor have any compelling reasons been advanced which make us believe that reconsideration of our recent precedent should be undertaken or recommended by this panel.

Accordingly, we summarily affirm the district court's dismissal of this action on the basis of the panel opinion in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, *supra*. *See* First Circuit Local Rule 34.1.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., BOSTON AND MAINE CORPORATION, DELAWARE & HUDSON RAILWAY COMPANY, MAINE CENTRAL RAILROAD COMPANY, PORTLAND TERMINAL COMPANY, and SPRINGFIELD TERMINAL COMPANY,
Defendants

Civil No. 87-0034-P

CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Currently before the Court are the following motions: Plaintiffs' Motion for Reconsideration of the Court's Order of January 30, 1987; Defendants' Motions to Dismiss Complaint;[1] and Plaintiffs' Motion for Interlocutory Injunctive Relief. For the reasons discussed fully below, the Court finds that it lacks jurisdiction and dismisses the action.

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[1] All defendants have joined in a Motion to Dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), (6). Defendant Guilford Transportation Industries, Inc. (Guilford) has also filed a separate motion to dismiss. In its separate motion, Guilford argues that if the Court retains jurisdiction over the action, Guilford is not a proper party. Due to the Court's disposition of the action on jurisdictional grounds, the Court does not reach the issue raised in Guilford's separate motion.

Plaintiffs Railway Labor Executives' Association [2] have brought this action for declaratory judgment and injunctive relief against Defendants Guilford Transportation Industries, Inc. (Guilford), Boston and Maine Corporation (B&M), Delaware & Hudson Railway Company (D&H), Maine Central Railroad Company (MEC), Portland Terminal Company (PT), and Springfield Terminal Company (ST) in response to the pending implementation of a number of leases among the various Defendants.[3]

Plaintiffs allege that the present pattern of intracorporate leases is just yet another step in Defendants' "systematic and deliberate plan to effect without bargaining the changes in rules and working conditions" which Defendants have heretofore failed to accomplish within the statutory requirements of the Railway Labor Act. Plaintiffs' Complaint for Declaratory Judgment and Injunctive

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[2] Plaintiffs include the Railway Labor Executives' Association, the International Federation of Professional and Technical Engineers, and the following 14 member organizations of the Association: American Railway and Airway Supervisors Association (Division of BRAC); American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood Railway Carmen (Division of BRAC); International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers and Blacksmiths, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Broherhood of Firemen and Oilers; Railroad Yardmasters of America (Division of UTU); Sheet Metal Workers' International Association; and United Transportation Union.

[3] The leases challenged by this action include: leases between B&M and ST, Finance Docket Nos. 30791, 30925,* 30951,* 30955, 30966,* 30981,* 30993,* 31003, 31015; leases between MEC and ST, Finance Docket Nos. 30967,* 31002,* 31023; and leases between D&H and ST, Finance Docket Nos. 30965, 30972, 31003. The seven docket numbers marked with an asterisk represent leases that have been implemented.

Relief ¶ 13, at 5. *See Railway Labor Executives' Ass'n v. Boston & Maine Corp.*, No. 86-0273-P, slip op. at 2-3 n. 3 (D. Me. July 8, 1987) (citing cases detailing history of labor dispute between parties). Count I alleges that Defendants are or will be in violation of a 1982 order of the Interstate Commerce Commission (ICC), Finance Docket No. 29720 (Sub-No. 1), by implementing the leases. Count II alleges that Defendants have willfully and deliberately violated various sections of the Railway Labor Act, 45 U.S.C. §§ 151-163 (1982). Plaintiffs allege that the Court has jurisdiction under 28 U.S.C. §§ 1331, 1336(a), and 1337(a), and under 49 U.S.C. § 11705.

I.

The underlying facts are not, at this juncture, complex. In 1982, Guilford, which already owned MEC and its subsidiary PT, obtained the approval of the ICC under section 11343 of the Interstate Commerce Act, 49 U.S.C. § 11343 (1982) (the Act), to acquire control of both D&H and B&M, including B&M's subsidiary ST. *See* ICC Finance Docket Nos. 29720 (Sub-No. 1) and 29772 (the 1982 orders). These acquisitions resulted in the corporate affiliation of the Defendants now before the Court. As part of its approval, the ICC imposed arrangements for the protection of employee interests known as the *New York Dock* [4] conditions.

Subsequent to the above acquisitions, Guilford sought and received notices of exemption by the ICC under section 10505 of the Act, 49 U.S.C. § 10505, which allow Guilford to implement the leases challenged by this ac-

[4] The *New York Dock* conditions were developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). These conditions are important to Plaintiffs because they require that employees affected by any transaction receive at least 90 days advance notice and that an implementing agreement be negotiated between all parties to the transaction before the transaction is consummated.

tion. *See, e.g.*, Finance Docket Nos. 30965, 30967. On December 30, 1986, MEC served a notice of the proposed lease transaction on the affected unions; the next day, Plaintiffs filed petitions with the ICC under the relevant dockets requesting that the ICC determine that the appropriate employee protective provisions are the *New York Dock* conditions imposed in the 1982 orders and not the *Mendocino Coast*[5] conditions usually imposed on exempt lease transactions. On January 14, 1987, the ICC released its decision acknowledging Plaintiffs' petitions and indicating that it would issue a subsequent decision on the issue raised therein. Finance Docket No. 30967. The parties still await the ICC's decision.[6] In the interim, Defendants are apparently required to adhere to the *Mendocino Coast* conditions in the implementation of the MEC leases.

Plaintiff filed the present case in this Court on January 28, 1987; they sought a temporary restraining order on January 29, just two days prior to the February 1st effective date of the challenged MEC lease. On January 30th, the Court denied the motion for temporary relief and dismissed Count I of the Complaint for lack of subject matter jurisdiction or, in the alternative, declined jurisdiction as to Count I because the issue fell within the primary jurisdiction of the ICC. *Railway*

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[5] *Mendocino Coast* conditions were developed in *Mendocino Coast Ry., Inc.—Lease and Operate*, 354 I.C.C. 732 (1978), *as modified at* 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (1982). Under *Mendocino Coast*, employees affected by a transaction receive 20 days advance notice, and the transaction may be consummated before an implementing agreement is negotiated between the lessee and lessor railroads and the affected labor interests.

[6] On May 12, 1987, the ICC released another decision which also deferred resolution of the employee protection issue pending the receipt of additional evidence and further investigation. Finance Docket No. 30965 (also encompassing Finance Docket Nos. 30967, 30972, 30981, 30993, 31002, 31003).

Labor Executives' Ass'n v. Guilford Transp. Indus., 653 F. Supp. 643, 645 (D. Me. 1987). The Court turns now to the arguments presented by the parties with respect to each count of the Complaint.

II. Count I

In seeking reconsideration of the Court's prior order, which dismissed Count I, Plaintiffs advance three separate requests. First, Plaintiffs ask the Court to retain jurisdiction of Count I. Second, Plaintiffs renew their request for injunctive relief pending the outcome of the ICC petitions. Finally, Plaintiffs ask that the Court stay further proceedings on Count I, including any referral of the determinative factual question to the ICC, until the ICC rules on Plaintiffs' petitions in the lease cases.

A. Jurisdiction

In pressing their original request for temporary relief, Plaintiffs did not address with specificity the issue of the Court's jurisdiction, nor did Defendants raise the issue in the brief time available for a response; neither party mentioned the doctrine of primary jurisdiction. Because Count I sought enforcement of the 1982 orders,[7]

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[7] The enforcement powers of the Court derive from section 11705 of the Interstate Commerce Act, which provides in part:

> (a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.
>
> . . . .
>
> (b)(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.
>
> . . . .
>
> (c)(1) A person may file a complaint with the Commission under section 11701(b) of this title or bring a civil action

the Court determined that Plaintiffs' right to relief depended on the resolution of the following factual question within the primary jurisdiction of the ICC: whether the challenged lease transactions fall within the scope of the 1982 orders. Because the question was pending before the agency, the Court also determined that it lacked subject matter jurisdiction. *Id.* Plaintiffs now expressly argue that under section 11705(a) of the Act[8] the Court has jurisdiction to enforce the 1982 orders and should retain jurisdiction while the ICC determines the above-stated predicate factual issue, a determination which Plaintiffs concede is within the primary jurisdiction of the ICC. Defendants counter that the Court's dismissal of the action is appropriate under the guidelines articulated in *Far East Conference v. United States*, 342 U.S. 570 (1952). Having now had the benefit of full briefing on the issue, particularly Plaintiffs' position regarding the referral option, the Court determines that no purpose would be served by retaining jurisdiction and therefore reaffirms its prior dismissal of Count I, clarifying any ambiguity that may have arisen from its prior discussion of referral.

The Court's reasoning rests on the unique relationship between the case pending before it and the several petitions pending before the ICC. Plaintiffs made an initial strategic choice to pursue their challenges to the present leases in the context of the exemption notices before the ICC. The alternative would have been to initiate an enforcement action of the 1982 orders, either by filing an action in this Court under section 11705(a) or by seeking a declaratory order from the ICC under

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> under subsection (b)(1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title. . . .

49 U.S.C. § 11705(a), (b)(2), (c)(1) (1982).

[8] *See supra* note 7.

section 11701, 49 U.S.C. § 11701(b). Plaintiffs chose to proceed in the exemption context because they perceived that their petitions would afford them the most immediate relief.[9] In their petitions before the ICC, Plaintiffs expressly raised the argument that the leases are transactions within the meaning of the 1982 orders. *See, e.g.*, Finance Docket No. 30967, 52 Fed. Reg. 2625 (1987). When, however, the ICC deferred its decision as to whether "the *New York Dock* conditions should also apply to this lease transaction, because it is allegedly just another transaction to further the control benefits attributable to the original acquisition of MEC by [Guilford]"), *id.*, Plaintiffs raised the same issue in the present enforcement action in this Court.

In issuing the January 30 Order, the Court expressed its concerns about ruling on an issue currently pending before the ICC. One concern is, of course, that the ICC action may moot the issue before this Court. This possibility may, however, be easily addressed by the Court staying any action until the ICC rules. Nevertheless, another concern counterbalances the wisdom of issuing a stay: if Plaintiffs have a right to have their claim resolved by this Court, the Court should not avoid its duty to render the appropriate relief. This concern may counsel immediate referral to the ICC of the determinative factual question, directing the ICC to address the issue and thus preserving Plaintiffs' rights.[10] But as the brief-

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[9] *See* Plaintiffs' Memorandum in Support of Motion for Reconsideration at 7: "[I]f the Commission did not impose the *New York Dock* conditions in the lease cases, the notice and negotiation protections [provided by *New York Dock*] would be lost while the applicability of those conditions to the lease transactions was litigated."

[10] It is possible that the ICC may resolve the issues pending before it without reaching the factual question presented by Count I. The Court notes that in a recent unpublished opinion, the ICC indicated that it was deferring the resolution of the appropriate level of employee protection for the challenged leases both in light

ing has expanded in this case, it is now apparent that the Court's initial concern about its jurisdiction provides the most significant justification for allowing the ICC to act first on all issues.

By bringing an enforcement action in this Court while the same issue is pending before the ICC in actions involving essentially the same relief, it appears to the Court that Plaintiffs have made a creative attempt to avoid the requirement of section 11705 that they make an election between the forums provided by the ICC and by this Court. *See, e.g., Louisville & N.R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916) (requiring claimant to elect between a complaint to the Commission and a civil action; decided under former 49 U.S.C. § 9). Plaintiffs' reluctance to have the issue referred to the ICC for determination highlights the problems created by their attempt to have both forums remain the forum of first instance.

Plaintiffs have requested that the Court, if it were to retain jurisdiction, "not refer [the determinative] issue to the ICC at this time." Plaintiffs' Memorandum in Support of Motion for Reconsideration at 7. Plaintiffs' request rises from their desire to avoid jurisdictional conflicts between this Court and the court of appeals, for this Court would retain jurisdiction over the referred question while the court of appeals would have jurisdiction over any results flowing from the petitions before

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of the status of these transactions under the 1982 orders and in light of independent factual issues such as the number of similar leases which exist in the Guilford corporate structure, whether these leases have a cumulative effect different from that which usually occurs in lease transactions, whether Guilford plans to initiate other leases in the near future, and the impact of the leases on Defendants' employees including a consideration of the manner in which Guilford is implementing the leases. Finance Docket No. 30965 (May 12, 1987), Plaintiffs' App. C.

the ICC. 28 U.S.C. § 1336(b), 2321(a), and 2341.[11] In the Court's view, it is precisely this type of conflict that is avoided by the election requirement of section 11705. Having initiated their fight before the ICC, Plaintiffs cannot in fairness avoid having the ICC remain the battlefield for all other initial skirmishes. If, as a result of the Court's dismissal of Count I, Plaintiffs are required to bring an original action before the ICC, the potential jurisdiction conflicts may be avoided, and Plaintiffs will have an opportunity to have their rights fully vindicated. Thus, even if the statute did not require an election between forums, the avoidance of forum shopping and the difficulties that overlapping forums present in light of the overall statutory scheme justify dismissal in this case. *See Montgomery Environmental Coalition v. Washington Suburban Sanitary Comm'n*, 607 F.2d 378, 382-83 (D.C. Cir. 1979) (finding dismissal proper where retention of jurisdiction by district court would conflict with appellate review of action by EPA).

Finally, even if the duplicity of forums were not determinative of the issue, Plaintiffs have not demonstrated that dismissal would be improper. In deciding whether to stay the action pending referral or to dismiss, the Court must determine whether dismissal will prejudice any party. *United States v. Michigan Nat'l Corp.*, 419 U.S. 1, 4-5 (1974); *Far East Conf.*, 342 U.S. at 577. Plaintiffs advance two arguments in support of the

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[11] Plaintiffs have also argued, however, that if the ICC decides, in the context of the pending petitions, that the challenged leases fall within the 1982 orders, Plaintiffs will ask the Court to enforce the 1982 orders on the basis of the new decision. In effect, Plaintiffs would have an enforcement action pending in this Court while the determinative questions are being resolved in a separate action before the ICC. It appears to the Court, however, that any enforcement action would flow from the new ICC orders. Although this issue is not squarely before the Court at this juncture, it does highlight the difficulties raised by the Plaintiffs' invocation of multiple forums.

Court's continued jurisdiction: one, Plaintiffs' concurrent request for injunctive relief bars dismissal; and two, Count I is inextricably tied to Count II. The Court addresses each in turn.

B. Request for Injunctive Relief

Plaintiffs' first argument is curious for Plaintiffs do not argue that they could not receive the same injunctive relief in an action before the ICC. More importantly, it appears from the record that Plaintiffs have requested this relief from the ICC in at least some of their petitions in the lease exemption notices. *E.g.*, Finance Docket No. 30965, at 2 n. 2 (May 12, 1987). The III has specifically rejected Plaintiffs' argument that they would be irreparably harmed if the lease transactions were consummated before the issue of employee protection conditions is decided. The ICC noted that even under the *Mendocino Coast* conditions, employees have a complete remedy at law to be "made whole" if the implementations proceed before the implementing agreements are negotiated. *Id.* Having had this issue resolved against them in the administrative context, Plaintiffs may not now come to this Court and argue that jurisdiction must be retained so that they might ask the Court for identical relief.

C. The Relationship of Count I to Count II

Plaintiffs' second argument centers on their allegation that some unspecified prejudice may result from the dismissal of Count I while Count II is pending before the Court. Because the Court finds, *see infra* Part III, that it also lacks jurisdiction over Count II, Plaintiffs' argument must fail on this ground.

The parties have not raised any additional claim of prejudice. Since it does not appear to the Court that there is any impediment to the Plaintiffs' initiating before the ICC the request for relief encompassed by Count

I, if Plaintiffs have not already done so in their pending petitions, the Court finds that dismissal for want of jurisdiction is proper.

III. Count II

In Count II of their Complaint, Plaintiffs allege that Defendants have violated various sections of the Railway Labor Act (RLA) by implementing the challenged leases. The allegation rests on three grounds: one, because the leases affect existing rates of pay, rules and working conditions, Defendants must bargain with Plaintiffs over these changes within the procedures provided by the RLA; two, in various agreements among the parties, Defendants have bargained away their right to lease their properties [12]; and three, Defendants have interfered with the rights of their employees to be represented by the labor organization of the employees' choice by communicating directly with their employees regarding the employment options under the leases.

Defendants argue that, regardless of whether Plaintiffs' allegations state a claim under the RLA, any RLA claim is preempted by the exemption found in section 11341(a) of the Act, 49 U.S.C. § 11341(a).[13] Plaintiffs

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[12] Paragraph 30 of the Plaintiffs' Complaint alleges that various agreements and practices between the parties prohibit Defendants from transferring work which is being performed by their employees to others without prior notice and negotiation. Because the motion before the Court is a motion to dismiss, the Court is required to construe the Complaint in the light most favorable to Plaintiffs, *see* 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1357, at 594 (1969), and therefore construes the above allegation as encompassing the argument advanced by Plaintiffs. By construing the Complaint liberally in favor of Plaintiffs, the Court does not imply any position regarding whether this construction of the allegation is supported by the as yet undeveloped facts of this case.

[13] Section 11341 provides in pertinent part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation partici-

have countered Defendant's argument by presenting the Court with a comprehensive analysis of the controlling statutory provisions and their legislative history. Were the Court writing on a clean slate, Plaintiffs' arguments would need to be commented upon in depth. Here, however, the Court finds that its decision is controlled by *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986).

In *Boston & Maine*, the First Circuit considered whether section 11341 of the Act precluded a party who was adversely affected by the implementation of a section 10505-exempted lease from pursuing claims that would otherwise fall within the jurisdiction of the federal courts under the RLA. *Id.* at 796-99. The Circuit held that the exemption provided by section 11341 relieves the participants from *any* legal obstacles that would impede the transaction. *Id.* at 800.

Plaintiffs have attempted to distinguish their claims from the *Boston & Maine* case by emphasizing the following three sets of facts: one, that in *Boston & Maine*, the ICC had specifically considered the effect of the lease on the parties' rights in the underlying exemption proceeding, where here Plaintiffs have raised these issues before the Court; two, the present case includes an allegation

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pating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

49 U.S.C. § 11341(a) (1982).

that Defendants had no right to enter the leases; and three, even under the section 11341 exemption, Defendants have no right to deal directly with their employees regarding the ICC-imposed employee protection conditions. The Court, however, finds *Boston & Maine* to be equally applicable to the present case and thus controlling precedent.

First, in formulating the relevant employee protection conditions to be applied to the challenged leases, the ICC is currently contemplating the effect of the leases on the collective bargaining rights of Defendants' employees. *See* Finance Docket No. 30965 (May 12, 1987) (unpublished). Plaintiffs' first argument thus loses much of its force in light of the ICC's contemporaneous consideration of this issue and the discretion vested in the ICC to "require the carrier to provide a fair arrangement" to employees whose interests are affected by the exempted transaction. 49 U.S.C. § 11347.

Second, the law of this Circuit is that Congress has expressly provided, through its enactment of section 11341, that transactions deemed to be in the public interest by the ICC override the rights and duties created by Congress in the RLA. Although Plaintiffs lose whatever their rights would be under the RLA, Plaintiffs have not lost all for they have a remedy—and are in fact concurrently pursuing it—compensation for the loss of their RLA rights. This remedy is provided by the ICC. Therefore, the forum for raising these arguments is the forum provided by that agency.

Finally, the breadth of the exemption contained in section 11347 [*sic*] also vitiates whatever force the remaining factual distinctions raised by Plaintiffs may have. Consequently, in accordance with the ruling of the First Circuit, the Court finds that it is without jurisdiction to consider claims ordinarily cognizable by this Court under the RLA where the alleged claims arise directly out of a lease transaction granted a statutory exemption by the ICC under the controlling statute. *Cf. Maine Cent. R.R.*

v. Brotherhood of Maintenance of Way Employees, 652 F. Supp. 40, 42 (D. Me. 1986) (finding that dispute concerning job protection benefits did not arise directly out of transaction approved by the ICC).

IV.

Over the course of this labor dispute, the parties have been repeatedly successful in invoking the jurisdiction of this Court to enforce the mandates of the RLA. Defendants' goal in these proceedings has not been hidden; they have sought and continue to seek a streamlined work force and the implementation of their conception of a cost-efficient labor agreement. Defendants' efforts, however, have been remarkably unsuccessful, due in part to their failure to reach a meaningful agreement with the unions involved and in part to the almost interminable procedures of the RLA, procedures which have been upheld by various decisions of this Court and which have been supplemented by various actions of both Congress and the President. Nevertheless, Defendants have now apparently discovered an alternate method to achieve a similar goal. Although the Court has examined the record presented in this case and has considered with care the arguments raised by Plaintiffs, the Court finds that Plaintiffs have presented their request for relief to the wrong forum. The relief they request is available only from the ICC and not from this Court. Accordingly, the Court hereby *GRANTS* Defendants' Motion to Dismiss and *DENIES* Plaintiffs' Motion for Reconsideration, Injunctive Relief, and Stay.

So *ORDERED*.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, Maine this 27th day of July, 1987.

APPENDIX C

INTERSTATE COMMERCE COMMISSION
CORRECTED DECISION*

Finance Docket No. 30965

DELAWARE AND HUDSON RAILWAY COMPANY—LEASE AND TRACKAGE RIGHTS EXEMPTION—SPRINGFIELD TERMINAL RAILWAY COMPANY[1]

Decided: February 17, 1988

Service Date: February 25, 1988

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* This corrects the decision served February 19, 1988, to reflect the modifications on pages 10, 12, and 13 that had been adopted by the Commission.

[1] This decision embraces Finance Docket No. 30967, *Maine Central Railroad Company—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30972, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30981, *Boston and Maine Corporation—Lease—Springfield Terminal Railway Company*; Finance Docket No. 30993, *Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31002, *Maine Central Railroad Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31003, *Delaware and Hudson Railway Company and Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31015, *Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31023, *Maine Central Railroad Company—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31086, *Maine Central Railroad Company and Portland Terminal Company—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30955, *Boston and Maine Corporation—Lease Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31103, *Boston and Maine Corporation and Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Rail-*

INTRODUCTION

The investigation that the Commission has instituted and recently concluded into the transactions that are the subject of this proceeding clearly establishes that a series of leases from four rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI), to a fifth carrier subsidiary, the Springfield Terminal Railway Company (ST), have, taken together, substantially injured GTI's employees. We are, therefore, imposing extraordinary labor protective conditions on these transactions.

Our actions are taken to protect the interests of GTI's employees. We find that while GTI's actions fall within the letter of our regulations at 49 C.F.R. 1180.2(d)(3), the manner in which GTI has proceeded in implementing these intracorporate leases has undermined its credibility and has contributed to a loss of confidence in its ability to provide adequate and efficient rail service in New England. Prompt good faith compliance with the terms

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way Company; Finance Docket No. 31115, *Boston and Maine Corporation and Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 31125, *Delaware and Hudson Railway Company—Lease Exemption—Springfield Terminal Railway Company*; and Finance Docket No. 31161, *Delaware and Hudson Railway Company—Operating Agreement and Assignment of Trackage Rights—Springfield Terminal Railway Company*.

In addition, the GTI carriers filed notices of exemption in Finance Docket No. 30925, *Boston and Maine Corporation—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*; Finance Docket No. 30951, *Boston and Maine Corporation—Lease Exemption—Springfield Terminal Railway Company*; and Finance Docket No. 30966, *Boston and Maine Corporation—Lease—Springfield Terminal Railway Company*. Although the labor interests had not previously asked that these notices be consolidated into this proceeding, they have since filed petitions seeking revocation of the exemptions for these notices. GTI filed a reply. Because the underlying transactions are closely related to the other GTI transactions, we are including these notices in this proceeding.

of this order would constitute a significant first step toward the restoration of that confidence.

Through a series of leases and trackage rights arrangements, discussed in more detail below, GTI has in effect restructured its operations so that one of its five rail carrier subsidiaries will henceforth be conducting all of its rail operations. While pursuing this course, GTI has failed to keep its employees fairly apprised of their rights and responsibilities under Commission-imposed labor protective conditions. Some of the information given by GTI was misleading and some was wrong. In other instances, GTI has appeared slow to provide the protection to which its employees are entitled.

To remedy this situation, we will impose on the transactions involved labor protective conditions that are different from those imposed in the usual lease and trackage rights transactions. We will also require that the parties engage in dispute resolution through negotiation of an implementing agreement between all of the GTI carriers and the employees of all the carriers, and, if necessary, binding arbitration. By imposing these conditions we will ensure that employees who were adversely affected by the transactions or were victims of the confusion about protective benefits receive the compensation that would have been accorded had labor protection provisions been properly administered by GTI under the circumstances.

SUMMARY

These proceedings involve use of the notice of exemption procedures set forth at 49 CFR 1180.4(g) in connection with transactions within a corporate family. *See* 49 CFR 1180.2(d)(3). The notices of exemption were filed concerning lease and trackage rights transactions involving the following wholly owned subsidiaries of GTI: ST, Delaware and Hudson Railway Company (D&H), Maine Central Railroad Company (MEC), Bos-

ton and Maine Corporation (B&M), and Portland Terminal Company (PT) (collectively referred to as "GTI" or "the GTI carriers"). The earliest notice (Finance Docket No. 30925) was filed on October 22, 1986, and the most recent (Finance Docket No. 31161) on November 17, 1987.

The labor protective conditions typically imposed as the minimum protection in lease and trackage rights transactions as set forth in *Mendocino Coast Ry. Inc.—Lease and Operate*, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980),[2] and *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast, supra*, 360 I.C.C. 653 (1980), adequately protect the interests of rail employees in normal lease and trackage rights situations and have been found to satisfy the statutory requirement of 49 U.S.C. 11347 that carriers involved in transactions under 49 U.S.C. 11344 provide fair arrangements for protection of their employees. Here, however, the Railway Labor Executives' Association (RLEA) and the Brotherhood of Locomotive Engineers (BLE) have sought revocation of the exemptions, or a change in the conditions for exemption, arguing that the labor protective conditions that were imposed in all of the cases are inadequate, and they seek a greater level of employee protection.[3] They argue that

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[2] *Aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 675 F.2d 1248 (1982), *See* Finance Docket No. 30532, *Maine Central R.R., et al.—Exemption* (not printed), served September 13, 1985, *aff'd sub nom. Railway Labor Executives' Association* v. *ICC*, No. 85-1636 (D.C. Cir. March 16, 1987).

[3] RLEA filed, between December 31, 1986 and December 8, 1987, petitions for revocation of the exemption and/or petitions for relief not otherwise covered in Finance Docket Nos. 30925, 30951, 30955, 30965, 30966, 30967, 30972, 30981, 30993, 31002, 31003, 31015, 31023, 31086, and 31103.

BLE filed, between February 1, 1987, and November 27, 1987, petitions to reopen and for relief not otherwise covered in Finance Docket Nos. 30981, 30993, 31003, 31015, 31103, 31125, and 31161.

RLEA filed its post-oral argument brief on December 8, 1987, accompanied by separate motions "for leave to file brief, time for

the labor protective conditions developed by the Commission in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), are more appropriate for these transactions and should be imposed in lieu of the *Mendocino Coast* and *Norfolk and Western* conditions.[4]

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filing having expired," and "for leave to file brief in excess of thirty pages." With its brief and motions, RLEA filed four separate petitions "for revocation of the exemption" in Finance Docket No. 30965, *et al.*, Finance Docket No. 30925, Finance Docket No. 30951, and Finance Docket No. 30966.

In support of its motion to late-file its brief, RLEA notes that its counsel was unable to file timely due to responsibilities in several other legal matters, some of which involve RLEA. RLEA also explains that the arguments set forth in its brief extend to the four simultaneously filed petitions for revocation, and that, therefore, the length of its brief will conserve and consolidate its arguments in these related matters. RLEA submits that the late filing and the length of its brief will neither prejudice the parties nor unduly delay the prompt resolution of this proceeding.

The limited delay resulting from RLEA's late filing and the excess length of its brief are insignificant when viewed in light of the extensive record, the length of the proceedings, and the importance of the issues to be resolved here. We will therefore grant RLEA's motions for leave to late-file its brief and for leave to file its brief in excess of the page limitation.

On August 18, 1987, GTI filed a motion to strike certain RLEA reply materials, or, alternatively, to submit further evidence. In view of our October 5th request that the parties submit further evidence, GTI's argument is mooted and its motion is denied.

On October 20, 1987, RLEA filed a motion to supplement a declaration and to file executed copies of other declarations it had filed on October 15, 1987. RLEA cited time constraints that prevented filing of executed declarations by October 15th, and indicated that the other declaration should be supplemented due to changes of material fact. RLEA's request will not delay the proceeding or prejudice any party. The motion is granted.

[4] The substantive benefits under *New York Dock* are virtually identical to those under *Mendocino Coast* and *Norfolk and Western*. *New York Dock*, however, does provide labor certain procedural advantages. First, the transaction cannot be consummated unless an implementing agreement between the carrier and the labor interest is already in place. By contrast, under *Mendocino Coast* and *Norfolk*

They argue in the alternative that the exemption is not appropriate and should be revoked for these transactions. The GTI carriers, on the other hand, believe that their actions were correct and that the proper labor conditions have already been imposed.[5]

Upon review of the record, we chose to fashion a remedy appropriate to the circumstances, and provide the opportunity for effective adjustment and resolution of

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and Western, if the transaction is consummated prior to the implementing agreement, the substantive benefits are applied retroactively. Second, employees who may be adversely affected by a transaction must receive at least 90 days prior notice under *New York Dock*, while only a 20-day notice period is provided under *Mendocino Coast* and *Norfolk and Western*. Finally, by custom and usage, there is a difference as to the parties to the implementing agreements required by the *New York Dock* labor protective conditions, on the one hand, and the *Mendocino Coast* and *Norfolk and Western* conditions, on the other. In the former, an implementing agreement must be arrived at between all parties to the proposed consolidation and the employees of all the parties. In the latter, implementing agreements are required only between the lessor/grantor of trackage rights and its employees, on the one hand, and between the lessee/grantee of trackage rights and its employees, on the other.

[5] The labor organizations' responses to the GTI notices of exemption raised the issue of the appropriate level of labor protection for these transactions. For example, in Finance Docket No. 30965, served January 22, 1987, our notice imposed *Mendocino Coast* conditions but advised the parties of RLEA's petition requesting *New York Docket* protective conditions and noted that "[a] separate Commission decision will follow to consider which conditions should be imposed."

As the number of GTI filings increased, we alerted the railroads to the possible consequences of their actions. For example, several months later in Finance Docket No. 31115, served October 9, 1987, our notice advised the parties that "[i]f, prior to the Commission's determination of the appropriate level of labor protection for these GTI transactions, B&M and D&H consummate this transaction and provide employees with *Mendocino Coast* protection, they do so at their own risk. Should the Commission subsequently determine that a higher level of protection is required, B&M and D&H will be required to provide employees with that greater protection."

disputes in this unusual situation. Thus, we conclude that imposition of extraordinary conditions, rather than ordering revocation, would better ensure that rail employees and services are adequately protected in this particular instance.[6]

Recognizing that various transactional activities have transpired over the period of time since October, 1986, we believe that ordering revocation at this time may be counterproductive. Moreover, noting the substantive benefits of conditions under *New York Dock*, *Mendocino Coast* and *Norfolk and Western*, are virtually identical, albeit with significant procedural distinctions,[7] we find it possible to use elements of those substantive benefits and tailor the procedures to fit the particular circumstances of this case.[8]

We, therefore, direct that: (1) the process for formulating an implementing agreement for all of the transactions (and any arbitration process) will include as participants ST, B&M, D&H, MEC, and PT, and the employees (or their representatives) of all of these rail carriers; (2) the parties will have 90 days to reach an implementing agreement (if, after 20 days, no agreement has been reached, any party may seek to submit the controversy to binding arbitration); and (3) GTI shall not implement the D&H and unconsummated B&M

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[6] Commission authority to do so can not be seriously doubted. See e.g. *New York Central Sec. Corp. v. United States*, 287 U.S. 12 (1932) (The Commission is "not limited to the conditions proposed or favored by the carriers"); *Baltimore & Ohio Railroad v. United States*, 386 U.S. 372, 430 (1967) (J. Brennan, concurring: "the ICC is not the prisoner of the parties' submissions" and must "weigh alternatives and make its choice according to its judgment how to best achieve and advance the goals of the NPT.")

[7] See Footnote 4.

[8] By doing so in this case, however, we specifically do not intend to alter or modify in any way the existing precedent or customary application, of *New York Dock*, *Mendocino Coast* or *Norfolk & Western* conditions in any other case.

transactions until the implementing agreement is reached or the arbitration process has concluded. Any transactions that have already been implemented will not have to be undone pending formulation of the agreement or conclusion of arbitration, but those transactions are to be covered by the agreement or arbitration. We find that these protective conditions, with the adjustments we have made, provide a fair arrangement for the affected rail employees.

The time frame for arbitration is that set forth in Section 4 of Article I of the *Mendocino Coast*, *Norfolk and Western*, and *New York Dock* conditions.

Once either side has requested arbitration, the parties have 5 days to select a neutral referee. If they are unable to agree on a selection within 5 days, then the National Mediation Board shall immediately appoint a referee. A hearing on the dispute must then be commenced within 20 days. Finally, the referee's final binding decision must be rendered within 30 days from the commencement of the hearing.

The arrangement we are imposing in this decision will, therefore, provide either a negotiated implementing agreement or an arbitrated final binding implementing agreement no later than 90 days from the service date of this decision.

BACKGROUND

Under all the notices, D&H, MEC, B&M, and PT lease their rail lines to ST and assign to ST their trackage rights over the lines of other rail carriers.[9] It is now clear that GTI is using the transactions to have ST provide service over the entire GTI system in lieu of the other carriers. While the GTI scheme is not a merger, the transactions, when viewed collectively, nevertheless

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[9] At the early stages of this proceeding the GTI carriers contemplated granting trackage rights to ST over some of their lines. Since that time those trackage rights arrangements have been superseded by leases.

constitute a substantial undertaking that will have an impact on all of the rail employees of the GTI carriers. It is our responsibility as here pertinent and under 49 U.S.C. 11347 to provide for a fair arrangement for the employees affected by the transactions.

These transactions fall under 49 U.S.C. 11343. The GTI carriers are members of the same corporate family, and the Commission has exempted, from the prior approval requirements of 49 U.S.C. 11343, transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. 49 CFR 1180.2(d)(3). Instead of filing an application under 49 U.S.C. 11344, rail carriers file under 49 CFR 1180.4(g) a verified notice with the Commission at least one week before the transaction is to be consummated. The GTI carriers filed notices of their transactions, and the exemptions became effective pursuant to the regulations.

All of the MEC transactions and most of the B&M transactions have been implemented. In a decision issued in May 1987, GTI was notified that implementation of these leases was specifically subject to our right to reconsider the necessary level of labor protection. At the request of the labor interests, in decisions served October 26 and December 18, 1987, the carriers were ordered not to implement any D&H transactions and any unimplemented B&M transactions pending resolution of this proceeding.

DISCUSSION AND CONCLUSIONS

1. EMPLOYEE PROTECTION

We find that imposition of appropriate labor protective conditions, rather than ordering revocation, is warranted in this case. Labor argues that the cumulative effect of the series of transactions will be to substitute ST as the operator of the entire GTI system. This, it is argued,

would be the effective equivalent of a consolidation or an acquisition by ST of the other GTI carriers, and, as such, merits *New York Dock* protection for the affected employees.

The labor interests also note that over 2000 employees will have been affected by the time all of the transactions have been implemented. They contend that imposition of the *New York Dock* conditions, which call for (among other things) a 90-day notice period prior to implementation of a transaction, will result in a more orderly transition for the workforce of GTI and ST.

Labor also seeks total revocation of the exemptions under which GTI has filed, claiming that the transactions simply do not meet the criteria of 49 CFR 1180.2(d)(3).

GTI counters that each ST transaction is a typical lease for which *Mendocino Coast* protection is appropriate. In each instance, employees of the lessor carrier (B&M, D&H, MEC, or PT) have stopped or will stop performing work on the leased properties, and employees of the lessee (ST) have taken or will take over those responsibilities. GTI points out that operationally and financially each lease has been designed to stand on its own. In GTI's view, the leases are related only to the extent that they are all meant to further the GTI system goal of providing more efficient service on a more profitable basis.

GTI also argues that there is no need for *New York Dock* protection here because the *Mendocino Coast* 20-day notice period is sufficient. In support of its position, GTI notes that between 1971 and 1977, when rail passenger service was assumed by Amtrak, approximately 20,000 employee positions were affected with only a 20-day notice period before consummation of each transaction.

GTI notes that the substantive benefits and eligibility requirements are identical under both sets of conditions and that the benefits must be afforded retroactively to

the time that an employee is adversely affected. Because employees can be made whole regardless of whether an implementing agreement is reached prior to or subsequent to consummation of a transaction, GTI contends that there is no need for the prior-to-consummation implementing agreement of *New York Dock*, instead of the post-consummation agreement of *Mendocino Coast*.

Upon review of the evidence, we are unable to conclude that the transactions are the equivalent of a merger, consolidation or acquisition of control. Nevertheless, we are persuaded that the impact of these transactions is very close to that of a merger or consolidation. There are, for example, a large number of employees who have been or would be affected by related transactions consummated within a short period of time. The transactions envision three relatively large railroads (and the small PT), operating over an extensive system of track throughout the Northeast, in essence being replaced by ST, a carrier heretofore operating only a few miles of track. (As of early October 1986, ST's operations were confined to Woodland, ME, Voorheesville, NY, Worcester, MA, Springfield, VT, Scotia, NY, and Chicopee, MA.) Together, B&M, MEC, and D&H had a combined workforce of over 2000 employees, whereas, as recently as January 1987, ST had only 50 employees. After these transactions are consummated, there would be no surviving workforces on B&M, MEC, D&H, and PT, while ST will have greatly increased its workforce to meet its new operating responsibilities.

The workforces of B&M, MEC and D&H are aligned along the traditional crafts of the railroad industry. Employee members of the different crafts are represented by various unions and have pay rates and work rules established through collective bargaining with those unions. ST's workforce, on the other hand, consists of one craft, the so-called "railroader." ST's railroaders perform all of the various tasks that on other railroads

are separated along craft lines. ST's railroaders are paid, on the average, less than are the employees of the other GTI carriers. In addition, ST's work rules are more favorable to the carrier than are those of the other carriers. Indeed, a major reason GTI is shifting its operations to ST is to realize the economies afforded by the railroader concept and the ST work rules.[10]

While assembling its workforce, ST has made offers of employment to present and former employees of the other GTI carriers. The record shows that GTI officials have made confusing statements to labor officials and to GTI employees regarding the effect of these offers. GTI has informed some employees that employment offered by ST must be accepted or the employees would forfeit all or some of their protective benefits. They have also been told that, if they accept an ST offer of employment without exercising their seniority rights with their GTI employer, they also forfeit all or some of their benefits.

Under Commission-imposed labor conditions, a dismissed employee is entitled to a dismissal or separation allowance unless he fails without good cause to accept an offer of comparable employment. In the typical lease or trackage rights situation, the offer of employment would come from the railroad for which the employee worked prior to the transaction. In this instance, an

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[10] The labor interests argue that with ST taking over all of the GTI operations, the traditional crafts and unions will be eliminated on the GTI system. They argue that the elimination of craft distinctions and removal of the various unions as representatives of GTI employees (and resulting loss of dues-paying members) will weaken those unions.

GTI contends that declining union membership is not relevant in deciding whether any special circumstances warrant the imposition of greater protection. GTI correctly notes that elimination of various crafts often occurs in connection with transactions of this nature. We note that to the extent there is a representation issue, it is a matter to be resolved by the National Mediation Board under the appropriate provisions of the Railway Labor Act.

employee of the lessor (or assignor of trackage rights), would in the usual case have to accept an offer of comparable employment made by the lessor to work for the lessor, with whom the employee already has an employment relationship. Thus, the lessor's employees would normally have no right to expect an offer from the lessee railroad. Moreover, they would be under no obligation to accept such employment, even if it were offered, since they had neither an employment relationship nor a bargaining relationship with the lessee.

In the typical case of a consolidation or acquisition, two or more railroads may combine their operations, with either a surviving entity conducting all of the combined operations or each carrier operating some portion of the consolidated operations. Where operations will be combined, the previously separate workforces need to be coordinated. Offers of comparable employment normally are made by the surviving operating entity to former employees of both railroads before any offers are made to outside parties. These offers must be accepted (if employees have exercised their seniority and have been dismissed), or the employees lose their protective benefits.

Here, GTI contends that ST is a carrier separate from the other GTI carriers and that ST does not intend to be a party to any implementing agreement or negotiations involving the employees of the other GTI carriers. GTI contends that those employees have no right to or expectation of employment with ST, but, nevertheless, if they are offered employment with ST, they must accept it or lose their benefits from their GTI employer. We find this approach contrary to established practice and we do not approve it.

GTI would treat ST as the typical lessee carrier--as if it were a foreign system with no obligation to offer employment to the work force of the remainder of the GTI family, and no obligation to negotiate over the merging of seniority rosters. But, on the other hand, GTI seeks

to avoid exposure to the payment of dismissal allowances by claiming that an employee who declines comparable employment with ST has forfeited rights under the *Mendocino Coast* protection plan.

There is, in the typical case under *New York Dock*, an obligation to take offers of comparable employment, but those offers are not ripened until an implementing agreement has been established and rights under the agreement can be assessed. Consequently, employees have the protection of a negotiated or arbitrated arrangement establishing seniority and the basis on which the new work would be performed. RLEA correctly notes (Post-Hearing Brief, at 24) that these features of implementing agreements have long been recognized by this agency as crucial to employees.

Although each of the several ST leases may be designed operationally and financially as independent transactions, we cannot ignore the significant impact of the series taken as a whole. Although we do not have a true consolidation here, the transactions represent restructuring of the GTI system with all of its operations to be performed by ST. In the typical consolidation transaction, it is necessary to coordinate work forces of two or more railroads. Here, to the extent that ST has offered employment to many former employees of the other GTI carriers, the outcome is similar in effect to a consolidation.

Thus, we are persuaded that employees affected by the ST transactions should be provided more than the standard protections that accompany lease transactions. While the *Mendocino Coast* protections have proven quite satisfactory for the normal case, it has always been understood that they are minima—that additional protections could be provided in the exceptional case. Because of the system-wide impact of the present arrangement and the substantial impact on numerous rail employees, the

need for an implementing agreement prior to any further reorganization is established.

In order fairly to protect rail employees in these unusual circumstances, we will require an implementing agreement (and binding arbitration, if necessary to achieve that agreement) that includes ST, the surviving operating entity, as a participant, along with B&M, D&H, MEC, and PT, and the employees of ST, B&M, D&H, MEC, and PT. This modification of the usual conditions will provide a basis for the fair selection of a workforce for the surviving entity.

Including ST and the representatives of the UTU on the ST lines as participants will remedy two problems identified by labor. First, inclusion of all concerned will allow recognition and negotiation of seniority more fairly. To date, and particularly with regard to the MEC employees affected by the early leases, the manner in which GTI has proceeded is unacceptable. Secondly, inclusion of all parties simultaneously will permit proper consideration of the extent to which the ST can and should provide for the respected practice that employees be permitted to "follow their jobs." This issue will be complicated because of the need to accommodate employment to the new operational structure on the surviving ST line. However, we are certain that these issues will be more fairly addressed by full-party negotiation or arbitration than they have been to date.

It is further necessary to be clear on the scope of employee rights under the implementing agreement we are requiring. Between the time that ST and GTI first implemented one of their transactions and the date of this decision, numerous employees in the GTI family have been required to make employment choices on what appears to have been unsatisfactory information. RLEA has argued that the "opportunity to know what their employment options are before they are required to exer-

cise (them)" is the "essential difference" for employees between *New York Dock* conditions (the conditions that labor has sought consistently throughout this proceeding) and *Mendocino Coast*. (Post-Hearing Brief, at 28.) We agree with this assessment, and we have decided that the transactions undertaken by GTI cannot be fairly accomplished without respecting this essential difference. Consequently, any implementing plan, agreed to or arrived at through arbitration, shall provide that the employees of the several GTI railroads as of the date of the first such transaction under 49 USC 1180.2(d)(3) shall not be deemed to have forfeited any rights or benefits as a consequence of decisions made prior to the development of such an implementing plan.

In order to cause as little disruption as possible, GTI is ordered not to implement the D&H and unconsummated B&M transactions until an implementing agreement is reached or the arbitration process has run its course. GTI will not in the meantime be required to "undo" any consummated transactions but those transactions are subject to the conditions we are imposing in this proceeding. The implementing agreement will extend to those transactions, and, when an agreement is reached or arbitration is concluded, GTI will have to make whatever adjustment to the consummated transactions the implementing agreement or arbitration award requires. We will review any appeals from arbitration awards associated with arriving at an implementing agreement.

Within this framework, we believe, both labor and management have incentives to negotiate promptly and in good faith. Because we are holding up consummation of certain transactions pending an implementing agreement or an arbitrated result, GTI would pursue a prompt resolution. In order to clarify the status of employees or former employees affected by already consummated transactions, employees and their representatives would also

favor a prompt resolution. These factors also provide bargaining leverage to each side. We agree, for example, with RLEA's statement (Post-Hearing Brief, at 27) that "employees have bargaining leverage flowing from the carriers' desire to consummate as quickly as possible which encourages compromise, and thus an agreement." While RLEA made this statement in the context of arguing for *New York Dock* conditions, the same bargaining pressure would be present under the conditions we impose here.

2. REVOCATION

As previously noted, we decline to revoke the exemption in favor of remedial conditions. Without an exemption from the Commission's authority, the transactions would be subject to prior approval and authorization by the Commission, for leases under 49 U.S.C. 11343(a)(2) and for trackage rights arrangements under 49 U.S.C. 11343(a)(6). This would necessitate the filing by GTI of applications under 49 U.S.C. 11344 and 49 CFR Part 1180. Under 49 U.S.C. 10505, however, the Commission is directed to exempt a transaction from these prior approval requirements when it finds that: (1) application of those requirements is not necessary to carry out the national rail transportation policy set forth at 49 U.S.C. 10101a; and (2) either (a) the transaction is of limited scope, or (b) the Commission's prior approval is not needed to protect shippers from the abuse of market power.

Under our section 10505 exemption authority, we have exempted from our review several classes of transactions governed by section 11343, including the class exemption at issue here, transactions within the same corporate family. *Railroad Consolidation Procedures*, 363 I.C.C. 200 (1980) and 366 I.C.C. 75 (1982). Other section 11343 transactions exempted under section 10505 as a class include acquisition or continuance in control of non-

connecting carriers under certain specified conditions [49 CFR 1180.2(d)(2)] and renewal, or extension in time, of leases [49 CFR 1180.2(d)(4)]. More recently, we have exempted as a class the acquisition and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are based on written agreements, and not filed or sought in responsive applications in rail consolidation proceedings [49 CFR 1180.2(d)(7)]. *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C. 2d 270 (1985), *aff'd sub nom. Illinois Commerce Commission* v. *ICC* No. 86-1386 (D.C. Cir. May 19, 1987).

The labor interests contend that the corporate family class exemption must be revoked with respect to the GTI transactions in order to advance two of the enumerated goals of the national rail transportation policy: encouragement of fair wages and safe and suitable working conditions in the railroad industry [49 U.S.C. 10101a(12)] and operation of transportation facilities and equipment without detriment to public health and safety [49 U.S.C. 10101a(8)]. They argue that these transactions should be subjected to more scrutiny than is required by the class exemption.

The exemption process is intended to reduce the regulatory burden on railroads of undertaking certain types of transactions, and to minimize regulatory delay. The vast majority of cases handled under the various class exemptions are non-controversial and in the public interest. This proceeding raised special, unusual issues that caused us to go far beyond the class exemption procedure. This does not require a finding that the class exemption is inappropriate. We have stated in the past that while class exemptions permit the vast majority of covered transactions to go forward without specific prior approval, we stand ready to consider any necessary modifications to a particular exempted transaction in exceptional circumstances such as those found here.

In this proceeding we thus have required extensive evidentiary presentations and legal argument in order to provide an adequate evidentiary basis for our resolution of the issues. The lengthy record we have developed has allowed us to consider fully the multiple goals of the national rail transportation policy. Given the length and scope of the record, we have given scrutiny equivalent to what would have been provided had the exemption been revoked and GTI required to file a formal application under 49 U.S.C. 11344 or an individual petition for exemption under section 10505.

In the circumstances of this case, revocation of the exemption has not been shown to be necessary in order to encourage fair wages, safe and suitable working conditions. Revocation of the exemption has not been shown to be necessary in order to encourage fair wages and suitable working conditions in the railroad industry. Revocation would require the railroads either to file an application under section 11343 or a petition for exemption under section 10505. It would not, however, automatically change the appropriate type of labor protective conditions for the GTI transactions. Furthermore, the adjustments that we have made here to the protective conditions should encourage fair wages and suitable working conditions. We conclude that the exemption need not and should not be revoked (except to the extent necessary to impose the appropriate labor protective conditions on the transactions).

The labor interests further contend that the GTI transactions do not fit within the corporate family exemption [49 CFR 1180.2(d)(3] because, it is alleged, they fall within the stated exception to use of the exemption. That is, they will result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

GTI claims that the lease and trackage rights transactions will improve service to shippers. From the record in this case, we are unable to determine whether GTI's optimism will be borne out. However, absent labor controversy, the transactions should not adversely affect service levels or cause significant operational change that would do damage to any shipper or to the pre-existing balance of rail competition in the Mid-Atlantic States or New England. Our focus is remedial. Because of the incentives and opportunities provided by the increased labor protection we are imposing in this decision, we believe that labor disputes can be promptly resolved by those who have the most to gain from their resolution—GTI's management and GTI's employees. Under the circumstances and as conditions here, the GTI transactions qualify for the corporate family exemption.

In addition, the labor interests argue that the *New York Dock* conditions are appropriate for these GTI transactions because the transactions are merely steps to further the control benefits attributable to the original control and acquisition of D&H, B&M, and MEC by GTI. The *New York Dock* conditions were imposed in those GTI control and acquisition proceedings. *See Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 I.C.C. 294 (1982) (*Guilford—Control—B&M*); and *Guilford Transp. Industries, Inc.—Control—D&H Ry. Co.*, 366 I.C.C. 396 (1982) (*Guilford—Control—D&H*). We conclude that the lease and trackage rights transactions are separate and distinct from the original control transactions as claimed by the GTI carriers.

The Commission approved GTI's control and acquisition of the B&M and D&H (GTI at that time already controlled MEC) in 1982 in *Guilford—Control—B&M* and *Guilford—Control—D&H* subject to the labor protective conditions of *New York Dock*. The labor interests contend that the recent leases and trackage rights arrangements between ST and the other GTI carriers are

actions taken to obtain the benefits of that control authorization. They argue that the leases and trackage rights grants are "transactions" within the meaning of Article I, Section 1(a) of the *New York Dock* conditions and that affected employees are therefore entitled to *New York Dock* protection.

The labor interests further contend that the *New York Dock* protective conditions do not apply merely to proposed coordinations set forth in an applicant's operating plan filed with its control application (under sections 11344 and 11345), but, instead, to "any action taken pursuant to authorization of this Commission on which these provisions have been imposed" (Article 1, Section 1(a), *New York Dock* conditions)]. GTI says that the leases and trackage rights were not even contemplated in 1982 and, of course, were not approved by the Commission at that time. GTI states that these later transactions were formulated more than 5 years after the control applications in order to meet new and changing conditions in the rail transportation market.

We are not persuaded that the ST lease and trackage rights transactions were anticipated or result from the D&H and B&M control transactions. On the contrary, the lease and trackage rights transactions are a wholly new development—one which is actually antithetical to the original idea of control—and stem from intervening events.

We find, therefore, that the recent GTI transactions are not "transactions" as defined in *New York Dock* taken pursuant to the earlier control authorizations, are not part of those control transactions, and are not covered by the *New York Dock* conditions imposed on those authorizations.

While we believe that the circumstances present in this case require that we impose extraordinary labor protection, we conclude that the exemption should stand,

subject to the partial revocation necessary to impose that level of protection. Full revocation is not justified and, in any event, return to the *status quo ante* at this time would risk paralyzing the process of resolving an exceedingly complex series of problems. Partial revocation as ordered here, on the other hand, is consistent with the public interest and will further national transportation goals and policies by simultaneously promoting safe and efficient rail transportation services and fair treatment of employees in the railroad industry.

This action will not significantly affect either the quality of the human environment or energy conservation.

We find:

The appropriate level of employee protection for these intracorporate transactions is that set forth in *Mendocino Coast Ry., Inc.—Lease and Operate,* 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980), (with respect to the lease transactions) and *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast, supra,* 360 I.C.C. 653 (1980) (with respect to the trackage rights transactions), with the following adjustments: (a) the process for formulating an implementing agreement for all of these transactions will include as participants ST, B&M, D&H, MEC, and PT, and the employees of all of these rail carriers; (b) as discussed above, the parties will have 90 days from the service date of this decision to reach an implementing agreement (The parties are at any time after the first 20 days free to submit these issues to arbitration. Arbitration proceedings, if any, are to be guided by the rules in Article 1 Section 4 of the standard conditions.); (c) GTI shall not implement the D&H and unconsummated B&M transactions until the implementing agreement is reached or the arbitration process has concluded.

It is ordered:

1. RLEA's motion to late-file its brief and motion to exceed the 30-page limit are granted.

2. RLEA's motion to supplement and to file executed copies is granted.

3. GTI's motion to strike is denied.

4. Finance Docket Nos. 30925, 30951, and 30966 are included in this proceeding.

5. The exemptions for these transactions are revoked only to the extent necessary to impose the employee protective conditions we have found to be appropriate.

6. This decision is effective February 29, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley, Chairman Gradison, Commissioners Sterrett, Simmons, and Lamboley commented with separate expression.

/s/ Noreta R. McGee
Secretary

(SEAL)

CHAIRMAN GRADISON, commenting:

In ordering increased protection for railroad employees affected by these transactions, the Commission has chosen a course of action which will lead to prompt and equitable resolution of existing disputes. Having considered the shippers' need for high quality service, the carriers' need for efficiency and the employees' need for a fair implementing agreement as required by Commission imposed protective conditions, this agency has directed labor and management to negotiate or to have any continuing disagreements regarding implementation resolved by an arbitrator within 90 days.

Under the arrangement which this Commission was uniquely positioned to impose, Springfield Terminal will have a workforce, employees will have clear choices based on clear protective benefits, and shippers will have service. While this resolution will cost the Guilford system more than it might have originally planned, it is nonetheless in the long term best interests of all parties concerned.

COMMISSIONER STERRETT, commenting:

In my view, the result reached in this decision, given the circumstances presented, will resolve some of the problems that have recently plagued rail service in the Northeast. Nevertheless, in light of the regrettable situation that gave rise to this proceeding, I feel that an additional comment would be appropriate here.

Guilford may have indeed acted within the legal parameters of our regulations. However, it has done so in a manner which has resulted in a great disservice to its employees, its connecting carriers, and, as has become increasingly more evident, the shipping public. Guilford's actions have even jeopardized the effectiveness of the very administrative process it exploited.

During the time that I have served as a Commissioner, this agency had consistently endeavored to fashion rules and processes of administration that maximize the benefits of our rail transportation system to all shippers and minimize the burden of regulation. While advancement of these goals has not been easy or without contention, I am satisfied that the endeavor has resulted in a more efficient and innovative rail industry that is clearly better suited to meet the transportation needs of this country. The fact that the regulated community has most often responded with restraint and intelligence to its new opportunities has been a significant element in allowing the process to go forward.

Unfortunately, deregulation's successes can easily be undone by reckless abuse of privilege and thoughtless opportunism. The manner in which our rules have been misused here is bound to provoke a reaction that is damaging in the long run to the efforts to create a sound, responsive transportation system. But for my concern for the reinvigoration of rail service in the Northeast, I would be tempted to revoke Guilford's newly contrived authorities altogether, as a clear signal to others to avoid its folly. As it stands, however, the Commission's decision holds the best prospect for settlement of the immediate dispute.

COMMISSIONER SIMMONS, commenting:

I am concerned about GTI's violation of the spirit of the class exemption for transactions within a corporate family. I do not believe the majority adequately deals with the possibility that in the future the procedure could be violated in a similar manner. Therefore, I would have reopened the class exemption proceeding on our own motion for revision to ensure that not only the letter but the spirit of the exemption is carried out henceforth.

COMMISSIONER LAMBOLEY, commenting:

Effective dispute resolution in this case requires imposition of protective conditions, the substance of which is derived from virtually identical provisions in *New York Dock*, *Mendocino Coast*, and *Norfolk and Western*,[1] combined with procedures fashioned to provide a remedy appropriate to the circumstances. Since our focus at this

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[1] *New York Dock Ry.—Control—Brooklyn Eastern Dist.* 360 I.C.C. 60 (1979); *Mendocino Coast Ry. Inc.—Lease and Operate* 354 I.C.C. 732 (1976) and 360 I.C.C. 653 (1960); and *Norfolk & Western Ry. Co.—Trackage Rights—BN* 360 I.C.C. 653 (1978).

juncture is necessarily remedial, revocation of exemption could well prove choatic and counter-productive for employees and shippers alike.

However, a cursory review of authority[2] would have demonstrated that the scope of the class exemption expressly did not include the series of transactions which were designed to bypass negotiations, and systematically effect transfer and consolidation of substantial operational activities of several GTI rail subsidiaries into one subsidiary.

In other transactions properly utilizing the intracorporate exemption to effect consolidation of operations, *New York Dock* conditions and procedures are routinely recognized as appropriate and applied without more.[3] Here, the GTI carriers attempted to structure and characterize their transactions to avoid those obligations.

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[2] See 49 CFR 1180.2(d)(3), Ex Parte No. 282 (Sub-No. 3) *Railroad Consolidation Procedures* (I) 363 I.C.C. 200 (1980), revised and modified (II) 366 I.C.C. 75 (1982); Ex Parte No. 282 (Sub-No. 9) *Railroad Consolidation Procedures—Trackage Rights Exemption* 1 I.C.C. 2d 270 (1985).

[3] Ex Parte No. 282 (Sub-No. 3) *Railroad Consolidation Procedures* (II) *supra.* (finding in part that Commission has no authority to exempt transactions from statutory labor protection obligations, and *New York Dock* conditions should be applicable. See also: Finance Docket No. 31191, *Missouri Pac. R.R. Co.—Merger Exemption—The Weatherford Mineral Wells & N.W. R.R. Co.*, notice of exemption served January 15, 1988; Finance Docket No. 31192, *Union Pac. R.R. Co.—Merger Exemption—Oregon Short Line R.R. Co., Oregon-Washington R.R. & Navigation Co.-Des Chutes R.R. Co., Los Angeles & Salt Lake R.R. Co. & Spokane International R.R. Co.*, notice of exemption served January 15, 1988; Finance Docket No. 31193, *Hampton & Branchville R.R. Co., Inc. & Colleton County R.R. Co.—Merger Exemption*, notice of exemption served January 11, 1988; and Finance Docket No. 31201, *Baltimore Belt R.R. Co., et al. and CSX Transportation, Inc.—Merger Exemption*, notice of exemption served January 21, 1988.

This case is instructional as an example of what carrier(s) ought not do. Unfortunately, it was done. Rail employment and services have been adversely impacted. Rights and interests of employees, shippers, and other carriers have been compromised. Hopefully, the remedy here crafted will provide the opportunity to ameliorate and adjust those consequences.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1774

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Plaintiffs, appellants,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Defendants, appellees.

JUDGMENT

Entered: January 20, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now hereby ordered adjudged and decreed as follows: the judgment of the district court is affirmed.

By the Court:

/s/ Francis P. Scigliano
Clerk

[cc: Messrs. Clarke and Moore]

APPENDIX E

Statutes Relied Upon

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh

45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 5 First

45 U.S.C. § 155 First

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

D. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been rquested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

E. Section 7 First

45 U.S.C. § 157 First

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

II. Rail Passenger Service Act, 45 U.S.C. § 501 et seq. (Excerpts)

A. Section 405(b)

45 U.S.C. § 565(b)

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees fair including affected terminal employees, and equitable protection by the railroad.

III. Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate

Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or services is of limited scope; or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 11341(a)

49 U.S.C. § 11341(a)

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

C. Section 11343(a)

49 U.S.C. § 11343(a)

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the

Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the property or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

D. Section 11347

49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangements may be made by the rail carrier and the authorized rep-

resentative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

IV. Title 28 (Excerpts)

Section 1337(a)

28 U.S.C. § 1337(a)

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

APPENDIX F

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors' Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers and Blacksmiths;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Department of UTU);

Seafarers' International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation • Communications Union (TCU); and

United Transportation Union.

APPENDIX G

IN THE MATTER OF ARBITRATION BETWEEN

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND
UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY

DECISION

File:

Finance Docket No. 30,000

Arbitrator:

Jacob Seidenberg, Esquire

Hearing:

December 13, 1984

Appearances:

Brotherhood of Locomotive Engineers
W.H. Hirst—Vice President
E.E. Watson—Vice President

Carriers

R.D. Meredith—Director Labor Ralations—
Union Pacific

R.P. Mitchell—Director Labor Relations—
Missouri Pacific

Post Hearing Briefs Received:

December 29, 1984

Issues:

1). Does Arbitrator have jurisdiction under Section 4, Article I of the ICC imposed New York Dock

Conditions to permit Carriers to transfer work from Missouri Pacific RR to Union Pacific and have transferred work performed under the operating rules and collective bargaining agreement between the Union Pacific RR and the BLE?

2). Does the proposed transfer of work constitute a fair and equitable basis for the selection and assignment of forces under a New York Dock transaction?

Background:

The instant dispute has been precipitated as a result of the Interstate Commerce Commission approving on October 20, 1982 the petitions of the Union Pacific RR, the Missouri Pacific RR and the Western Pacific RR to consolidate and create a new railway system.

In the course of effectuating this new railroad network, the affected Carriers sought to achieve certain "common point consolidations". The parties to this dispute reached agreement on seven common points, but were unable, after six conferences, to reach agreement at the following three common points: Salina, Kansas, McPherson, Kansas; and Beloit, Kansas.

On October 30, 1984, the disputants agreed to submit the matter to arbitration, as provided for by Article I Section 4 of the New York Dock Conditions. These Conditions had been imposed by the Interstate Commerce Commission upon the Carriers as protections for the employees of the three Carriers affected by the consolidation.

The parties selected the Undersigned to hear and decide the dispute.

On October 19, 1983, the ICC issued a Decision under Finance Docket No. 30,000 (Sub-No. 18) in response to petitions filed both by the BLE and UTU relative to the

Commission's plenary jurisdiction over rail consolidation *vis a vis* the requirements of the Railway Labor Act.

The substantive aspects of the dispute stem from the notices served by the Carriers on the Organization pertaining to the selection and assignment of forces at the three common points, and counter proposals thereto. However, before we can deal with the merits, we must review a procedural objection which the Organization has interposed to the Arbitrator's jurisdiction to consider the dispute.

Organization's Position (Procedural)

The Organization notes that Article I, Section 2 of the ICC prescribed New York Dock Conditions states:

> "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Organization maintains that the Carriers seek to avoid their statutory obligation under the Railway Labor Act, not to unilaterally change rates of pay or terms of working conditions, except in accordance with the provisions of Section 6 of the RLA. The Organization specifically protests the Carriers' efforts to get rid of the Local Agreement of August 10, 1946 in effect on the Missouri Pacific as well as other working conditions. The Organization stresses that at each of the three common points the Carriers do not propose to abandon tracks or facilities. It just seeks to substitute Union Pacific employees and Union Pacific rules for Missouri Pacific employees and Missouri Pacific rules without complying with the RLA requirements.

The Organization asserts the explicit language of Section 2 of Article I, proscribed the Carriers from utilizing Section 4 of Article I as a means to change existing agreements, except by mutual consent. If further asserts that it would be ironic to transmute the New York Dock Conditions from a shield designed to protect employee interests to a sword to deprive employees of their Railway Labor Act protections.

The Organization alludes to several (6) arbitration awards which have found that arbitrators acting under the mandate of Section 4 lack the authority to modify or vitiate existing collective bargaining agreements, in light of the explicit provisions of Section 2. The Organization notes that the Carriers, despite all of the cited awards, did not even request the ICC to overrule these arbitration awards. The Carriers should not be permitted in the instant case to overrule these well reasoned awards.

The Organization notes that the October 19, 1983 ICC clarification has been appealed to the Federal Courts and the appeal is still pending.

Carrier's Position (Procedural)

The Carrier states that since the ICC issued its October 19, 1983 Clarification, the jurisdictional question raised by the Organization is moot and settled. The ICC has held its authority over railroad consolidations is exclusive and plenary, and its approval of a transaction exempts such a transaction from the requirements of all laws including the Railway Labor Act. The Carriers note that the ICC Clarification states:

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payments of specified benefits, our jurisdiction to approve transactions requiring changes in the working con-

ditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

The Carrier maintains that the arbitration awards rendered prior to October 19, 1983, must be deemed to have been superceded by the ICC's Clarification Decision. Since the ICC authored the New York Dock Conditions, its holdings as to the intent and purpose of these Conditions must be deemed superior to any arbitral decisions interpreting the Conditions. The Carriers add the ICC Clarification makes it patently clear that no existing working conditions in a collective bargaining agreement barred the execution of the ICC approved Consolidation.

The Carrier further stresses that since the ICC rendered its Clarification Decision there have been two arbitration awards which held there was jurisdiction in an Article I, Section 4 arbitration proceeding to consider changes in existing collective bargaining agreements.

The Carrier states on the basis of the present record there can be no doubt that this Arbitrator, acting under Section 4, has the jurisdiction and authority to approve the transfer of work from the Missouri Pacific to the Union Pacific and place the transferred work under the operating rules and collective bargaining agreements of the Union Pacific.

Findings: (Procedural)

On the basis of the record before us we conclude that we now have jurisdiction to consider the dispute involving the allocation and assignment of forces through implementing agreements drafted pursuant to New York Dock Conditions, even though these implementing agreements may result in the assigned forces operating under a different set of operating rules and different labor agreement than the ones under which they formerly functioned.

We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the Consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions.

When we turn to the substantive aspects of the dispute dealing with the three common points, there are three separate and discrete matters which will be treated in considering the proposed implementing agreements.

Salina, Kansas

This point is currently served by both the UP and MP. Both Carriers serve it by freight assignments. The UP also serves it by switch engine assignments, and the MP by a traveling switch engine.

The Carriers now propose to service Salina by a single UP traveling road switcher which will operate within a 50 miles area of Salina under the UP's operating and schedule rules. The MP traveling switcher will be abolished.

The Organization proposes that the Road Switcher shall be operated by MP employees and it will not perform any switching within the switching limits of Salina.

The Carrier also sets forth how road operations will be handled into and out of Salina and off the MP's Salina Division. These proposals are to have UP crews handle traffice routed via UP while MP crews will handle traffic routed via the MP. Employees adversely affected will receive the protection of the New York Dock Conditions.

The Organization stresses that MP engineers will only be able to exercise their seniority on their own seniority district. If they transfer to another seniority district, they would be listed after the most junior employee in that district. The Organization stresses that since the New York Dock Conditions now offer maximum protection for only six years, this does not effectively afford any meaningful protection to younger employees. It urges the work should be prorated on the basis of engine hours or road miles.

Findings:

After reviewing the detailed proposal contained in the draft implementing agreements of the parties attached to their respective Submissions, we conclude that the Carriers Implementing Agreement (attachment No. 1) with its addenda, more effectively achieves the consolidation and coordination of the operations at Salina. We are not at liberty to overlook that the ICC approved the consolidation under the common control of the Union Pacific Railway System. Accordingly, we find that Carriers' Attachment No. 1, dated September 18, 1984, constitutes the appropriate arrangement for the Salina operations and it is to be the implementing agreement for the Salina operation.

McPherson-El Dorado

McPherson is serviced by both the UP and MP. The UP services McPherson by a local freight assignment operating out of Salina while the MP services it by a local freight assignment operating out of El Dorado. Salina is 35.4 miles from McPherson while El Dorado is 61.7 miles from McPherson.

The Carriers propose to serve McPherson by combining both local freight assignments into a single local to be governed by UP schedule and operating rules. The UP would man the operation for five months and the MP for seven months. The Organization's counter proposal is to apportion the work—36% to UP and 64% to the MP. The Carriers propose Salina to be the home terminal, and the Organization counter proposes that Salina be the home terminal, when the UP engineers are manning the assignment and El Dorado will be the home terminal when MP engineers are protecting the work. The Organization further proposes that when MP engineers operate their alloted proration they will operate under MP rules and MP schedule provisions covering rates of pay and working conditions.

Findings:

We find that the objectives of the coordination and consolidation would be facilitated by the Carriers' proposals as set forth in their Attachment No. 2 attached to Carriers' Submission, with one exception, namely, that when the MP engineers operate the local frieght assignment their home terminal should be El Dorado rather than Salina. The great bulk of MP engineers live in the vicinity of El Dorado and there is no persuasive reason why these engineers should travel approximately 90 miles to work that assignment. However, we find that in the interest of uniformity and consistency of operations that the assignment should operate under UP rules rather than shift back and forth periodically between MP and UP.

Accordingly, we find that Carriers' Attachment No. 2 with its Attachments set forth in its Submission, except as herein amended, shall constitute the implementing agreement to handle the UP and MP traffic between Salina and El Dorado.

Beloit

Beloit is serviced both by UP and MP. The UP services it with local freight assignments operating out of Salina while the MP services it with a local assignment operating out of Concordia. In addition the MP operates several local freight assignments operating west of Frankfort such as:

Atchison-Concordia Local
Concordia-Stockton Local
Down-Lenora Local

The Carriers propose to abolish these listed MP operated Local Assignments and serve Beloit with a consolidated operation to be operated by MP crews because most of the employees living near Beloit are MP employees. The consolidated assignment shall operate, however, under UP rules and schedule provisions.

The Organization contends there is no valid basis to compel MP employees to operate UP rules. The MP employees should be allowed their own rules, rates of pay and working conditions when they function under their allocated proration.

Findings:

We find the allocation of work of Beloit as proposed by the Carriers is fair and reasonable and therefore the description of work set forth in Attachment No. 3, attached to Carriers' Submission, should be governed by the Carriers' proposed implementing agreement.

Accordingly, Carriers' Attachment No. 3 with its attachments shall constitute the implementing agreement to handle operations at Beloit, including the designated territory listed in aforesaid Attachment.

In summary we are aware that any consolidation of rail properties disturbs the status quo and is unsettling to the affected Organization and employees. However, the

Interstate Commerce Commission held that the Consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement. We find that the Carriers have sought to select and assign the forces, in a fair and reasonable manner, and still achieve the efficiency and benefits which were the prime motivations for seeking the Consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation.

We conclude that the approved proposals, as amended, covering the three common points are an appropriate method for the selection and assignment of forces, and should be effected by the prescribed implementing agreements.

Decision:

Pursuant to Article I, Section 4 of the New York Dock Conditions, we find that the implementing agreement set forth in Carriers' Attachment No. 1 shall be the method for selecting and assigning the forces for the Salina operation.

We find further that implementing agreement, as amended, set forth in Carriers' Attachment No. 2, shall be the method for selecting and assigning the forces for the McPherson-El Dorado operation.

We also find that the implementing agreement set forth in Carriers' Attachment No. 3 shall be the method for selecting and assigning the forces in the Beloit operations.

/s/ Jacob Seidenberg
JACOB SEIDENBERG
Arbitrator

January 17, 1985.